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TRIAL FOR A DUEL IN FRANCE.

In March, 1845, a duel was fought with pistols, on the Bois de Bologne, between Monsieur Beauvallon, the challenger, one of the editors of the Globe, and Monsieur Dujarier, the editor in chief of the Press; two newspapers of different parties, and of great circulation and influence. At the first fire Dujarier was struck in the head and instantly died. The circumstances were made known to the police; and the "*chambre des mises in accusation*," in Paris, a branch of one of the courts answering to our grand jury, having made the proper investigation, adjudged that in point of fact the seconds were not liable to prosecution, and that in point of law no indictment could lie against the survivor. From this judgment the attorney-general took an appeal to the court of cassation.

The law of the case is very brief, and as simple as a code can be. It declares, "All voluntary homicide is murder." "All murder with premeditation is assassination." But codification does not always prevent the necessity of construction. In this case the question presented itself whether homicide in a duel is within the prohibition of the text. The court of cassation affirmed the judgment of the lower tribunal in the case of the seconds, reversed it as to the principal, and in the exercise of its discretionary power, sent the case to the "Court d'Assises de la Seine" at Rouen for

further proceedings. The parties, who after the duel had avoided, returned in their own good time, and the trial commenced at Rouen, on the 26th of March last.

The following account of the proceedings is derived entirely from the published reports in the French papers, interspersed with such occasional remarks as may tend to illustrate the facts; but of the excitement which was produced, first by the duel, and then by the prosecution, it is almost impossible to convey an idea. It will be seen, however, that the parties and witnesses were collected from the press, the theatres, the restaurants, and the literary saloons of the French capital, each of which furnishes the means of high interest to the Parisian population; exhibiting a state of society and manners which is peculiar to this gay people.

The indictment, or as there called, the "act of accusation," is a remarkable document, and first claims attention. It was very long and minute, entirely free from all technical forms, and embraced some things which, according to our notions, are quite inconsistent with the due administration of justice. It commenced thus: "On the 7th March, 1845, there were assembled at dinner, at the restaurant '*des Freres Provenceaux*,' at Paris, eighteen or twenty persons, among whom was le Sieur Dujarier, editor of the Press, and le Sieur Rosamond de Beauvallon, one of the editors of the Globe, the Count de Flers, le Sieur Roger de Beauvoir, le Sieur Arthur Bertrand, several actresses attached to various theatres, and especially Mademoiselle Lievenne, one of the artistes of the Theatre Vaudeville. An evening party which had been given just before, at the house of the last-named person, was the occasion of this dinner. At that party, at a card-table, a stake of fifteen or eighteen louis ($60 or $64) remained in doubt, and as nobody claimed the money, it was agreed to consider it as a contribution to the expense of a dinner, at which the persons present should attend, and that the additional expense of the dinner should be defrayed by a personal assessment. Some invitations were also given. Thus the Count de Flers brought Roger de Beauvoir. Dujarier was invited by Mademoiselle Lievenne, who had dined and passed the evening previously at his house, and she took this opportunity of returning the civility. But Dujarier felt little disposition to accept the invitation, and had told Monsieur Veron, editor of the Constitutionnel, that he had been to Mlle. L. to get excused; that she was not at home, but her chambermaid had told him her mistress would be greatly hurt if he did not attend, and he insisted that Monsieur V. should go with him. Unfortunately, Dujarier did not yield to the secret presentiment which admonished

him to refuse the invitation. Overcoming his repugnance, he went to the party and sat down at table with Beauvallon, who, having been present at Mademoiselle Lievenne's soirée, was by right one of the guests on this occasion."

"Before entering on the details of facts which brought about the deplorable meeting of 11th of March, [these are the words of the indictment,] it is not perhaps useless to ascertain who Dujarier was. (*Ce qu'etait Dujarier.*) He has been represented as a man of proud and offensive deportment, pleasing himself in giving a disagreeable turn to the conversation; a man, in a word, with the insolence of an upstart. There was, nevertheless, nothing of the sort in his character, and in this respect there is no safer way than to rely on the deposition of Monsieur Sers, who, for a whole year, had been his messmate. This witness declares that Dujarier never was of a quarrelsome temper; that he had only remarked in him a little roughness in his manners, and a dryness with persons he did not like; but that there were a great many persons who could not pardon him for having acquired the elevated rank he held in journalism, and the elegant luxury in which it enabled him to live; that he was a skilful manager of affairs; active and intelligent, renouncing pleasure when it interfered with his business, and although quite young, had realized a considerable fortune. At the same time he spent liberally what he had rapidly acquired, and enjoyed at the card-table the reputation of a generous and even a rash player.

"It must be remembered, however, [the indictment continues,] that his intercourse with a class of society distinguished by the greatest freedom, and his intercourse with females, who never demanded of others a reserve which they did not impose upon themselves, had led him into the habit of indulging in certain liberties of language which gentlemen are not accustomed to use. Thus, at this dinner, he questioned Monsieur de Beauvoir about his dress, and proposed a toast in relation to his hair, his cravat and his waistcoat, to which Beauvoir replied by an attack upon the *Press.* Some minutes afterwards, if Beauvoir's testimony is credited, Dujarier stood up and announced that he should now proceed to talk familiarly with the ladies, (*tutoyer toutes les femmes,*[1]) and then ad-

[1] The French use the second person singular of the pronoun or verb only among very intimate friends. It is never used between the sexes unless by man and wife, or when the relationship prohibits that connection. A departure from this rule implies a degree of intimacy which is tolerated only in certain classes, *ou règne le plus grand abandon. Tutoyer* is to speak in the second person singular; that is, without restraint or formality.

dressing Mlle. Lievenne by her first name, he boasted that in six weeks he would possess himself of her person. It must be noticed, however, that the words addressed to Mlle. Lievenne, according to Beauvoir, escaped the attention of the other guests, who, too numerous for general conversation, were occupied for the most part in talking with those who sat near them. When they rose from table Dujarier and Beauvoir engaged in conversation, of which the terms are not very precisely retained, but which appeared to turn upon an article which the latter had sent to the Press, and which he desired to have printed without delay. At the end of this conversation D. asked B. if he was seeking an affair with him. B. replied he never sought affairs, but sometimes found them. B. then left the party for the theatre, where he was expected. D. then, led by Mons. Bertrand, went up to Mlle. Lievenne and asked her pardon for anything he might have said offensive to her feelings. She, who has declared that none of the guests had used towards her any improper language, did not hesitate to accept the apology, and offered her hand in taken of reconciliation. By this time several other persons invited for the evening had arrived. The dinner-table was removed, and dancing commenced in the dining-room to the music of a piano; a lansquenet table was prepared in an adjoining room, and the doors were closed between the two apartments, at the request of the players."

The indictment proceeds to narrate, at great length, very minutely the course of the play, at which with others, D. and B. were engaged, and to state a difficulty that arose between them, as to a bet of 75 louis ($300) and of another claim of B. on D. for 84 louis ($336) which were referred to the close of the evening. It states that D. had lost 125 louis ($500) and that B. had gained 12,000 francs ($2400) in the course of the night; that when the accounts were settled, D. refused all consideration of the first difficulty, which, in the vicissitude of the game, he said it was now impossible to ascertain; but in adjusting the last he called upon the landlord to lend him ten Napoleons, with which and the money in his purse he paid the debt. The indictment avers, "that in these discussions during the play and after it, no irritating words had been exchanged, no offence against civility been perpetrated; that both confined themselves to a formal and measured politeness, as is customary with gentlemen not much acquainted with each other, but intending to conduct themselves upon the rules of conventional propriety." It adds, "that D. was surprised the next day by a visit from le Sieur Equevilliers and the Count de Flers, who demanded satisfaction for his conduct the preceding evening,

as well on the part of Roger de Beauvoir as of Beauvallon; that he looked upon this proceeding as very strange, but immediately named two friends with whom those gentlemen might make the necessary arrangements.

The interviews and discussions of the four persons, who in our phraseology would be called seconds, there termed *witnesses*, are narrated at full length in the indictment. From these it appears, (we now abridge the indictment,) that by the law of the duel, when a man receives a challenge from two persons at the same time, he may select his adversary, but that Beauvoir's mother died the night after, which put him *hors du combat* for a month, and that D.'s seconds had to arrange Beauvallon's matter alone; that all attempts to settle the matter were ineffectual; that a duel was inevitable in their opinion, and the weapons were then to be determined on. It is something remarkable that it was a subject of discussion whether the challenger or challenged had the right of choice. Finally it was yielded to the seconds of Dujarier, who then proceeded to inform him of the state of the affair. In this conversation he declared to them, "that he saw no reason for a duel, but that he was determined to accept the challenge; that being young and directing a newspaper that provoked numerous enemies, his position required him to fight, and that to refuse this first invitation would bring upon him twenty others; that he knew B. had great reputation as a swordsman, and he would, therefore, meet him with pistols." Being informed that B. was even more expert with a pistol than a sword, D. still persisted in his choice. The rencontre was arranged for the next day. "Thus," avers the indictment, "these two men were about to place their lives at the chance of single combat, while one of them was ignorant of any cause for it. His ignorance is proved by the terms of his will, which during the night he drafted. The preamble, written in one of those solemn moments when a man is absorbed by interests too serious to disguise the truth, is as follows: 'On the eve of a duel for the most futile cause; for a pretext the most absurd, without its being possible for my friends to enable me to avoid with honor a meeting which is imposed on me by the injurious terms in which it is required, I make this my last will.'"

The indictment then proceeds in these words: "As to the real motives which induced B. to challenge D., there is nothing but conjecture more or less founded to rest on." Having averred the absurdity of finding anything at the dinner adequate to the purpose, it declares, "in the minds of a great number of persons, it had its rise in a secret animosity, which B. nourished against D.

On the evening previous to the duel, B. told one of his friends that he was irritated with the editor of the Press. This irritation might be on a personal account, or an hostility between the two journals in which they were respectively interested." The indictment goes on to discuss various causes of personal and professional irritation which might have soured their minds, and to show their inadequacy to the purpose; but it is useless to take up space with these abstractions, because, while lawyers and judges were at fault in this hunt for motives, the public mind settled the cause without hesitation. D., proud of his success, of his social position, of his intimacy with Alexander Dumas, and associates of that rank, was unwilling to mingle familiarly in the company that was about to assemble in the restaurant Trois Fréres Provenceaux, which, being the most famous in the Palais Royal, was exposed to universal observation. He was with difficulty persuaded to go himself, and worse than that, he absolutely refused to allow his mistress, an artiste of the Porte St.-Martin to make one of the party. *Hinc illæ lachrymæ.*

Next the indictment recites with great exactness all the arrangements made by the seconds for the meeting; the manner and time of the arrival of the parties on the ground; the state of the weapons; the flashing of the caps before loading; measuring the ground; charging and delivering the pistols; the word to fire; the discharge; the nature of the wound and its instantaneous fatal effect. It proceeds: "This combat, forbidden by sound morals, and by the law, which cost the life of a man, was it conducted according to those strict rules of integrity, always to be observed in those hostile meetings which have assumed the name of affairs of honor? This is questionable. First, because the chances were as unequal as possible. Dujarier was a perfect novice with a pistol. In taking his pistol he drew the trigger involuntarily, and if it had not missed fire would have exposed his second to great hazard, as he was giving him his last instructions. Beauvallon, on the contrary, was exceedingly skilful, and he had declared to a friend that he was more able with the pistol than the sword. It is to be feared, also, that the pistols used by him on the ground, had been used by him in practice."

The indictment then recites various circumstances, tending to show that between the challenge and the combat, B. had possessed himself of these pistols, and had practised with them at a shooting gallery, of which there are many in Paris, a transaction which it treats as destroying that equality required by the "loyalty of honor." It adverts again to the moment of the duel, and the manner

in which the parties were to fire, and without averring whether they were or were not observed, states certain matters as facts, to show that D. fired first and almost instantly on the word, while B. reserved his fire until he could take deliberate aim; and that he took for this purpose a time longer than was permitted by the agreement, of which he had been duly informed.

To all this is added a further allegation, certainly very strange according to English or American precedents, as follows: "If the reflections above made are necessary to understand the facts of the case, it is not less important to inquire into the morality of the person accused. There is found in the history of his past life an act, which has never been the subject of any criminal prosecution, and which is now covered by the statute of limitations, but which it is proper to adduce. In the first days of the month of January, 1840, one Mlle. Bovis, originally from Guadaloupe, to whose house Beauvallon often resorted, and whom he called his relation, perceived that a watch which belonged to a member of her family had disappeared from the place where it was usually kept. Search being made, it was found to have been pledged to the Pawn Broker's Bank by the prisoner. One Monsieur Cambier went on the part of Mlle. Bovis to B., who received him very cavalierly, but nevertheless gave to Bovis the pawn-broker's duplicate for the watch, and money enough to redeem it. Mlle. Bovis has declared, on this preliminary investigation, that Beauvallon did not steal the watch, but that it was lent to him. But at the time when the watch disappeared she was much more explicit. She then declared he was capable of stealing it, and when she learned afterwards that he had taken it and pledged it, she, for a long time, refused to permit him to visit her house."

The indictment then recites the proceedings giving jurisdiction to the court at Rouen instead of Paris, and thus concludes: "In consequence, Rosemond de Beauvallon is accused of having, on 11th March, 1845, committed voluntarily a homicide on the person of Dujarier, with the circumstance that it was done with premeditation."

This strange charge of theft to make out a case of murder may need one word of explanation in this place. In point of fact the larceny was clearly proved at the trial. To an inquiry of a distinguished lawyer as to what bearing it could possibly have on the case, he said that a French jury would only tolerate duels among men of honor, and a man would forfeit his privilege to commit murder if it was believed he had ever been a thief.

Connected with this criminal accusation, because depending on

the same facts, was a civil suit for damages, by the mother and nephew of the deceased. By the French law, if a man wounds or kills another, he is liable to pay the wounded person, if he lives, or his next of kin, if he dies, for the civil injury done them. The criminal charge is submitted to a jury, of whom seven may return a verdict. The civil action is decided at the same time, both as to law and fact by the court.

The accused, being interrogated by the president, admitted that he and D. met and fought, and that at the first fire D. fell and instantly died. He declared that the cause of the duel was, the offence given him at the dinner party, more by the manner of D. than by his words; that he sought an explanation or apology; that D. refused either, and referred the whole subject to his two friends; and that at the interview he pretended not to know from whom the demand came, speaking of him as a Monsieur Beaufallon, or Beautallon with an air of derision that put the controversy on a new ground; and that the seconds of D. although they repeatedly said the affair ought to be settled, and should be settled, proposed nothing, and did nothing to repair the injury to his feelings. That the message sent to D. was formalized thus: "Mons. Beauvallon thinks you have been impolite to him, and he asks if you had the intention to wound his feelings." It was necessary, after making this demand, that Mons. D. should either deny such intention, or by refusing to do so be considered as avowing it. If the seconds of Mons. D. had said Mons. Dujarier had no intention to hurt the feelings of Mons. Beauvallon all would have been settled.

Being questioned as to the weapons, B. answered that he proposed the sword, because he was adroit at it, and could easily disarm or slightly wound D. without endangering his life; that he had no wish, desire, or intention to take his life; that in the expectation that the sword would be the weapon, he went, while the matter was in process, to a fencing master to take a lesson of disarming, in order to be more certain of being able to do so on the field. That in his opinion a duel with pistols was atrocious and ridiculous. Atrocious, because no one could tell where the ball would go; it might, against one's intention, inflict a mortal wound; and ridiculous, because, if neither party was struck, they lay under the imputation of fighting only with powder; he therefore directed his friends strenuously to insist on the sword.

In regard to the pistols the accused denied all knowledge of them. He admitted they belonged to his brother-in-law, and were loaned to his friends to be used on the occasion, but averred he saw

them for the first time on the field. Being interrogated as to the affair of the watch, he said, "I committed a fault of youth, and cruelly have I expiated it." Notwithstanding this open and frank confession of the accused, the prosecution according to the French law had made no progress. He admitted the duel, but the law of duel was an open one with the jury. He avowed the motive, and averred its sufficiency. He declared the duel was in all respects fair, loyal, and equal in its arrangements and conduct. He denied his intention to take life, adroitly maintaining that he selected and urged the use of a weapon of which he was master, that he might spare the life of his adversary, whom he would rather humble by disarming or slightly wounding, than expose him to be killed.

The case then was to be carried on by witnesses, and forty-six were summoned by the prosecution. But it is observable that witnesses are not selected by one party and the other because their testimony may be favorable to any particular view of the cause, but for the purpose of submitting all the information that can be had to the consideration of the jury; and hence it is, that the judge, not the counsel, proceeds to interrogate them in the sole design of establishing the truth. The common law doctrine, that no one may discredit his own witness, never perplexes the proceedings. The duel being admitted, and its fatal result undeniable, the conviction of the party depended mainly on the application of the text of the law already cited to cases of voluntary combat. But it might be that the nature of the duel would determine this question of applicability, and hence it became necessary to ascertain whether the parties held that position in society that would entitle them to settle their disputes by the law of honor; whether the provocation for the challenge was adequate; and whether the combat was in all respects fair. The accused had fortified himself by his answers on all these points, and witnesses were called for their testimony.

The first was Alexander Dumas, the most voluminous and popular writer of the day. Being asked in common form what was his profession, he replied — "I should call myself a dramatic poet, if I was not in the birthplace of Corneille;" — an answer that touched the hearts of the audience, for Rouen has honored the memory of Corneille by a magnificent marble statue on the bridge upon the Seine, and by another in the immense palace in which the court was assembled.

Dumas was a common friend of both parties. His information of any facts was only by communication from D., who told him that he was to fight B. with pistols, and Dumas knowing how un-

skilful Dujarier was, sent his son with him to a shooting gallery to practise, where he was able to hit a mark as large as a man only twice in fourteen times. But Dumas's evidence went strongly to the point of the respectability of the parties as men of honor! He was very learned on the law of duel, referring to a book in his library on that subject, which the judge informed him, made no part of his own, either private or professional. Dumas added his opinion, that if the weapons had been swords the entire disparity of the parties in skill would have prevented a fatal result. Upon which the accused rose and returned him his grateful acknowledgments.

But the duel grew out of the dinner. What was the society, the conduct and the character of this entertainment? To these points most of the gay company that assembled at the Freres Provenceaux were called to testify, and the appearance of journalists and artists of distinguished talent, gathered such a crowd in the court room, and so strongly excited the curiosity of the public, that the judge had repeatedly to admonish them that they were not in a theatre.

The dinner was given in one of the most celebrated establishments at the Palais Royal, at an expense of 55 francs ($11,00) a head, and the party retired only at daylight. The dancing was animated and the gaming extravagant. Instead of reciting the evidence, we give an extract from the commentary of counsel upon it. "I distrust," he says, "that kind of life, where a man gains by his profession 500 francs a month, and wins 12,000 in an evening. Is it said such winnings were a happy accident, and that he had not the money to lose? We ought to find such conduct only in a millionaire, and not in one who purloins a watch and pledges it for the means of going to a ball. But see the state of things at this party, and judge the freedom of its manners and its language. In this world everything has a propriety of place. A liberty that would be highly offensive in a company of Quakers, would be perfectly in place in the convivial entertainment of a gay and dissolute assembly. I know, indeed, that this assembly, so dining and dancing and gambling, is not to be thus characterized, for Mlle. Lievenne was there; Mlle. Alice Clery was there; and Mlle. Atala Beauchene was there; and of course it was perfectly modest and fashionable. (*Laughter among the audience.*) But it was a pic-nic at 55 francs, where the company was invited to amuse themselves, and where the set and sober tone of every one's conversation is not to be wearied by rule, or remembered by daylight."

The argument was pursued to the point that these were not scenes where violated honor needed vindication by personal combat. In regard to the fairness of the meeting, much of the testimony went to implicate B. with having by connivance with his seconds practised with the pistols that were used on the field, contrary to the terms of the cartel. The evidence was circumstantial, not very full, and in some respects contradictory. A violation of agreement here seemed to be considered, all round, as exceedingly hazardous for the defence. Testimony was given to show that he had reserved his fire, and then had deliberately taken aim; but upon this point also the opinion of the witnesses differed.

The character of Dujarier entered largely into the question before the jury. Was he or not a "*chercheur des affaires?*" (a seeker of quarrels,) was he obstinate or placable? To prove the state of his mind, and that he would not willingly have entered into the combat, evidence was given to the point that he was well satisfied of B.'s superiority at any weapon, and had a strong presentiment, that the duel would be fatal to him. He went to Mons. Dumas the day previous, to pay a debt, and desired him to present it before the hour of their meeting, as his banker would not pay the money after his decease. He spent the night in drawing his will and in writing two letters, of which one to his mother was as follows:

"If this letter reaches you, my dear mother, I shall be dead or grievously wounded when you receive it. I fight to-morrow with pistols. It is a necessity, and I meet it like a man of courage. If anything could make me hesitate, it is the thought that you will feel the pain of the blow which I may receive; but honor is imperious, and if your tears are to flow, I prefer to have them fall for a son worthy of you than for a coward. One feeling softens my regret. It is that my last thoughts will be of you. I am calm and self-possessed; the right is on my side, and I abandon myself to my destiny. Adieu, my dear mother; I embrace you from the bottom of my heart, and with all the affection of my filial love.

DUJARIER.

Mlle. Sola de Montes was examined to the same point. She was an artiste of the Theatre Porte St. Martin, a Spaniard, who spoke French imperfectly, and her connection with the deceased may be ascertained from the letter which he wrote her the morning of the duel. "My dear Sola: I am going out to fight with pistols. This explains why I have slept alone, and why I do not come to see you this morning. I have need of all my calmness. At two o'clock all will be over. A thousand embraces, my dear Sola, my good little wife, whom I love so much, and the thoughts of whom will never leave me."

Mlle. De Montes spoke highly, as may be supposed, of his kind and amiable qualities. She had expressed her desire to be introduced to B. and to go to the dinner, but Dujarier positively refused to allow it. She received the letter on her return from rehearsal, and immediately took means to prevent the duel, but it was too late. "I was," said she, "a better shot than Dujarier, and if Beauvallon wanted satisfaction I would have fought him myself." She received the corpse from the carriage, and the emotion which she then experienced was still visible in her testimony. To a question in relation to it she exclaimed — "Good God, sir! do you suppose that a woman in my position can have no feeling?"

The evidence being finished, the question of damages was spoken to by Mons. Leon Duval, and the jury were then addressed by Mons. Berryer, who has the reputation of being the most eloquent advocate of the French bar. The orator, in a splendid but brief speech of forty minutes, having maintained that everything in the origin and progress of the duel was perfectly loyal, placed the defence on the ground that the French law contained no prohibition of duelling. He considered the text cited as applicable only to assassination and murder in its popular sense, and that it would be no better than murder in courts or juries, to take the life of a man upon a construction strained for the purpose, against the obvious intention of the noble spirit in which it was enacted. He admitted that there were once laws against the duel, and he cited the edicts of Henry 4, and Lewis 13 and 14 and 15. But these, he said, were not in the right which man held over man, but, like the anathemas of popes, councils, and the Catholic hierarchy, they were a claim assumed to punish the transgressors of the Divine law. When the Catholic religion ceased to be the religion of the kingdom, this claim of right no longer could be admitted. "It is said religion and morality are opposed to the duel. Religion! I ask what religion? In the actual state of our society be not surprised, when you talk to me of religion, that I ask, what religion? Be not surprised, when you say the duel is prohibited by religion, by civilization, that I quote to you the words of a man profoundly religious, who has expressed himself to this effect. The manners of the French people are those of chivalry. They are elegant. They substitute the duel for assassination and murder. When the honor of man or woman is attacked reparation is necessary. The barbarian takes his revenge in murder, the Frenchman in honorable combat. Legislation is vain. Brave men laugh at it. This is the language of Mons. Guizot, the first minister of the crown. It must be so; the duel is the complement of civilization."

The Attorney-General, in answer to the brilliant harangue of Mons. Berryer upon the law, contented himself with producing the decree of the court of Cassation, reversing the judgment of the lower court, and by this he contended that the law in the case of duel was conclusively established. But with an apparent consciousness that the jury would not so consider it, he reviewed the circumstances of the supposed provocation and fight, and argued that the former was frivolous and the latter unequal. By the course of practice in the French court, the prisoner's counsel had a right of reply, and Berryer was again heard in another attack upon the law, of which he maintained that the jury were supreme judges, bound only by their own sovereign will. "As to the provocation," said he, "do you forget the rude remark of Dujarier to a demand for the winnings, 'I owe you nothing, and I shall pay nothing;' or again, when he was made sensible of his debt, that he sent to the landlord to borrow the money, an act of offensive insolence to which no gentleman could submit?"

The arguments being closed, the president of the court made an address to the jury. The published accounts of the trial content themselves with speaking of it in terms of high commendation, without stating even one of its points. From a private source we learn, that the president instructed the jury that to kill a man in a duel is murder by the law of France. That the fact of killing being proved by the voluntary discharge of a loaded pistol, the defendant was chargeable with the offence imputed to him. That the jury had a right to declare that it was done under alleviating circumstances; and to ascertain these circumstances, to consider all the antecedent conduct of either of the parties, the dinner, the alleged provocation, the negotiation for a compromise, and the manner of the fight. That a duel produced by excited passion or by an impulsive human pride or human weakness, might be entitled to a mitigated verdict; but that if the alleged provocation was a mere pretence to gratify previous malice, if reasonable reparation for the supposed injury was refused, or if the combat was unfair or unequal, the act was not an affair of honor, and not entitled to any such diminution; but on the contrary, the assumption of calling it a duel was a false pretence to disguise its true character, a mask which the law would indignantly remove, and visit upon the wearer the penalty incurred by deliberate assassination.

After ten minutes' absence, the jury returned their verdict in the following form. The foreman rising, and being asked, "Is the accusation true?" replied, "Upon my honor and my conscience, before God and before man, the declararion of the jury is, No. The

accused is not guilty." The pleadings then commenced in relation to the civil damages, the discussion of which appertained to the court alone. It was contended that this verdict was conclusive upon the civil as well as criminal process, but the court overruled the exception and decreed that the costs of the civil process should be paid by the plaintiffs — the widow-mother and nephews of the deceased — that these costs, with a further sum for damages, amounting to fr. 20,000 ($4000) should be paid to the plaintiffs by Beauvallon, and in default of payment that he should be imprisoned two years.

There are some other facts revealed by this trial that may not be without interest. The newspaper, *La Presse*, of which Dujarier was the responsible editor and conductor, was the property of a joint stock company, divided into 25 shares, each share selling at the time of his death for fr. 60,000, or $12,000; and each receiving an annual dividend of fr. 7390 $\frac{20}{100}$, or $1478 — but since his death the dividends had ceased; the value of the shares had greatly depreciated, and a new assessment was required of the proprietors. His personal ability had raised the value of the property from almost nothing to the high state above mentioned, and he was himself the owner of eight shares.

The manner of holding the court and its incidents may perhaps be worth a notice. The court assembled in the "*Palais de Justice*," at Rouen, an immense Gothic building, fantastic in its architecture and exuberant in its ornaments, erected some two hundred years before the settlement of New England. The chamber occupied by the court was the original room of the parliament of Normandy, and annexed to it is the Salle des Procureurs, (Lawyer's Hall) one hundred and sixty feet long and fifty high. Both these immense spaces were guarded by armed soldiers and crowded with spectators; for the railroad from Paris had poured out that numerous population, to whom this trial was a real spectacle of editors and artists, more exciting than the imitations of the stage. Privileged seats were reserved, and entrance given by tickets. But neither the bayonet of the military nor the red *toges* of the judges could succeed in preserving order. Outside, the windows were often blocked up by the curious, so that the light was excluded; and within, the parties were almost suffocated for want of room and air.

The proceedings were often interrupted. This is a specimen:

Voice from a distance. Mr. President, who has the best right to a seat, a soldier or a witness?

President. What is the reason for such an interruption?

Voice. Because here is a soldier sitting down, while I am obliged to be squeezed in a crowd.

President. Let the soldier make room for the witness.

Voice. But we are two, and there is room only for one — (*audience laugh.*)

President. Let the soldier go to his post.

In the course of the proceedings, Berryer, who seemed to think that coming from Paris to a provincial court he might assume something by virtue of his rank in the profession, proposed to read a paper, which the presiding judge ruled out of order, whereupon Berryer replied with some sharp remark that procured violent applause from the auditors; for the popular feeling went entirely with the defence. The court immediately ordered the hall to be cleared, and that the officers proceed instantly to enforce the orders, and it was only at the earnest intercession of a member of the bar, who in the name of the auditory formally apologized to the presiding judge for this rudeness, that the order was rescinded.

The trial commenced on Thursday, 26th March, and was continued on Friday, Saturday, and Sunday. The court on the three first days, opened at 10 A. M., and with one hour's intermission, continued in session until 6 P. M.; but on Sunday, after sitting all day, they held an additional session from 7 until 2 o'clock the next morning, when the proceedings terminated.

The verdict was rendered against the declared opinion of the highest court of the kingdom and of that in which the cause was tried, on the great question of law. Its whole progress was a spectacle, for its result was anticipated from the beginning, and well justified the language of Mons. *Leon Duval* in the course of his speech: "You will understand by the defence," said he, "that Beauvallon is a man of high spirit, bearing himself nobly and proudly, commanding the crowd by the fascination of his speech, and the choicest of his associates by the grandeur of his play. Is it so? By whom for three days have we been surrounded? Whose company have we kept? Is such a duel that 'complement of civilization' of which you have heard, and is the nice honor which it should preserve best nurtured amid the excitement of a dinner party, by wine, women and cards? Beauvallon may escape, but the high and chivalric cause of honor will gain nothing by his impunity. Such a cause is disgraced by the connection, and duelling itself will by this example become ridiculous."

Recent American Decisions.

Circuit Court of the United States, Massachusetts District, October, 1845, *at Boston.*

Samuel Warner *v.* Adams Daniels and Joseph E. Fales.

In a suit in equity brought by the vendor of land to set aside the conveyance for fraud, a mortgagee of the vendee was brought in to defend, but it was shown that the mortgage was discharged before the bill was filed, and there was no evidence of any collusion. It was held, that the mortgagee was a competent witness for the respondent; but that he would not have been, if he had remained interested.

A witness is not rendered incompetent by having received a copy of the interrogatories before the time of testifying, without any comments or any influence used to affect his answers.

A witness is not rendered incompetent by having received a letter from one of the parties, requesting him to tell the whole truth, without any suggestion as to what the writer considered the truth to be.

A mistake as to the value of the consideration given for the conveyance of land, is not a sufficient ground for setting aside the conveyance, where the vendor had means of avoiding the mistake by inquiry, and no fraud or falsehood was used to influence his judgment.

But if a vendor of land is clearly shown to have been overreached in a material degree, by impositions, concealments, or misrepresentations, made by the vendee, on which he properly relied, he will be relieved in equity.

And to sustain such a charge, the whole circumstances of the case, and the character and relations of the parties, are proper subjects of consideration.

Courts of equity can go more on what is called presumptive evidence, than courts of law.

Where the bill charges that a company, represented by the respondents to have been duly organized, was never duly organized, the record of the organization is the best and suitable evidence of the fact, and not the oath of one of its officers.

Where the vendee of the land made representations respecting the value of the consideration, which were false in material points, and which influenced the vendor to sell, whether the vendee knew them to be false or not, it was held that they would vitiate the sale.

So also if they were made by another person in the presence of the vendee, and he was benefited by them.

Suppressio veri, is as fatal as *suggestio falsi*.

Conversations of the respondent with other persons, on a subject of a kindred character, near the time of the transaction, and illustrating his intention, are competent evidence for the complainant.

An entire failure of consideration in the receipt of what is mere moonshine, is often sufficient to rescind a contract; although mere inadequacy of consideration is not sufficient.

Where the aid of a court of chancery is indispensable to obtain the discovery of the important facts in the case, an application for relief can be sustained in connection with that discovery, in the circuit courts of the United States, notwithstanding the 16th section of the judiciary act prohibits such relief when it can be obtained at law.

Length of time, short of the statute of limitations, is sometimes a bar; but not if fraud exists, or if the delay is accounted for, or if such a course would work injustice.

If either party cannot restore the property in good condition, damages may be given; and if the inability to restore happens by the course of the complainant, it should not prevent his obtaining relief in some manner, if he was not then aware of the fraud.

D. purchased a farm of W., paying him therefor in shares of the stock of the Cleft Ledge Granite Co., which he represented to be worth $6000. Several representations were made to W. by D. and also by F., who was concerned in the same company, to induce W. to take the stock in payment, which representations proved to be false, and the stock worthless. On a bill in equity by W. for relief, it was decreed, that the sale should be rescinded, the shares reconveyed by W. to D., and the farm by D. to W., and a master appointed to report the amount of rents and waste, after deducting permanent improvements, which should be allowed to W. by D.

But if neither the land nor the shares could be reconveyed, the master must examine and report the damage done to W. by the misrepresentations of D. and F., and a decree be entered against them for the amount. And if the land could be reconveyed, and not the shares, the land must be reconveyed, and the value, if anything, of the shares, at the time of the sale, deducted from the net income, and a decree made for the balance.

This was a bill in equity. It alleged that on the 19th of November, 1836, the complainant was seized of a farm in Wrentham, in this state, worth $6000; that Daniels and Fales then held what purported to be certificates of shares in the Cleft Ledge Granite Company in New Hampshire, valued at $6000, the company having a capital paid in of $200,000; that they proposed to purchase said farm of the complainant for a valuable consideration, and pay him in shares of said company; but in order to induce him to make the exchange, they averred, that the stock was worth its nominal value in Boston, and more than any Boston bank stock; and that it would pay a handsome dividend next spring; and if the quarry was worked, would yield 100 per cent. on its value; that they wanted the farm for the silk business; that they owned a brig, employed in carrying stone, and wished the complainant, formerly a sea captain, to command it, by which he would make $1500 a year; that they owned a number of other vessels employed in the same business, had a number of contracts for furnishing stone, and one with the government for $100,000; that several persons from Newport had bought into the company, and that Colonel Bates and various other men were employed by it, and large contracts,

through their influence, were likely to be obtained at Newport and Portsmouth in behalf of the United States. The bill next alleged that, relying on these assurances, he entered into an agreement with the respondent, Daniels, who was then acting for himself and Fales, to convey to him the farm for $6000, to be paid for in said shares at the price per share which should be paid in per share when the deed was executed; and that still relying on the aforesaid assertions of Daniels and Fales, the complainant, on the 8th of December, 1836, made a warranty deed of the land to Daniels, and received from him therefor a number of papers purporting to be certificates of 240 shares in the Cleft Granite Ledge Company, representing $25 each of its capital stock, amounting by computation to $6000, and which were the only consideration paid to him by Daniels, and were received on the supposition that $25 had actually been paid in on each of them.

The bill further alleged, that the company never, in truth, had anything paid in on said shares, or any of its capital; that it was a mere fiction, got up to defraud the public; that the stock never had or could have any value; that the certificates therefor were false and fraudulent, and so known to be to Daniels and Fales, and that they were aware that the assertions made about them were false, and with intent to defraud the complainant. Moreover, in order to "bewilder" the complainant, and prevent him from causing the conveyance of the farm to be annulled, it was averred that Daniels, on the 10th of December, 1836, executed a mortgage deed of the farm to Elisha F. Fales, a brother of J. E. Fales, purporting to secure a note of the same date to him for $1765, and for the same purpose, on the 9th of October, 1837, Daniels made another mortgage thereof to S. B. Scott, a copartner in trade and brother-in-law of Daniels, to secure a note of the same date for $4200; and it was charged, that the mortgagees conspired with Daniels and Fales to enable them to complete their imposition on the complainant, and took the mortgages without any bona fide consideration passing between them; and prayed that they be made parties to the bill. The bill alleged further that, notwithstanding all these falsehoods and frauds, the respondents had refused to yield any relief; had cut valuable timber from the land; had declined to get the mortgages discharged, and to reconvey the land, or to pay rent for the same, or pay to him the nominal value of the shares; and therefore it put them to answer certain interrogatories under oath: and concluded, praying a decree against them for the $6000 and interest since the original conveyance, or to have the

mortgages cancelled and the land reconveyed with payment for the strip and waste and rent. A prayer was also interposed for an injunction against waste during the pendency of the bill, and the appointment of a receiver of the rents.

The answer of Daniels admitted that Warner once owned the land, but denied it to have been worth even $3000; and averred that he and Fales being in Wrentham about the time named in the bill, accidently, without any previous concert or design, heard that the complainant had a farm to sell, and expressed a willingness to buy it, if they could be allowed to pay for it in their way; that they examined the farm and informed him they had no means to pay therefor, except in shares of the Cleft Ledge Granite Company; but denied that he exhibited more than one certificate of said shares, or any papers, showing it had a capital stock paid in of $200,000, or that said stock was alleged to be of par value, or would pay a handsome dividend, or that the farm was wanted for the silk business, or that the company owned a brig, &c.; and extending the denial to all the averments of that description, set out in the bill; and to any other of like tenor, said to be made either by him or his agents. The answer then proceeded to allege that in August, 1835, Daniels purchased about 300 acres of land in Maine; for which he gave $8 per acre, paying 1-4 in cash and the rest in three annual instalments; and in October, 1836, sold 3-4 of his interest in the same to Joseph Fales at cost, taking in payment therefor Fales's obligation for $5249 in Cleft Ledge Granite stock, and the balance in notes of that company, and that in his first interview with Warner he informed him of this obligation from Fales, and left with him a copy of the act of incorporation of the company, and the by-laws and list of officers thereof, and a report of Doctor C. T. Jackson, a distinguished geologist, as to the quarry; and stating only the truth on the subject. The answer further declared that the respondent Daniels informed the complainant, he was but little acquainted with the value of the stock; but that Warner could visit Boston and ascertain its value, and go to Durham and examine the quarry before trading, and if then concluding to make the exchange, might find him at the Lamb Tavern in Boston. That in about a week after, Warner did visit Boston, and said he came to inquire into the value of the stock; but little passed between them till the next evening he informed the respondent that he had conversed with the president of the company, and was willing to take the stock at par value, if the price of the farm could be mutually agreed on; that the parties spent nearly

two days in settling the price at $6000, being much beyond the true value, in consequence, as the respondent avers, of false and exaggerated representations of the complainant; and that in the course of the conversations, then had, the respondent learned, for the first time, from the complainant, that the quarry had been purchased originally for $4500 by some individuals connected with it, and then sold to the company for $53,000, the latter giving notes on time for the consideration, and which must be paid before a dividend could be made; that this would take a long period, and the holders of the notes must receive stock in payment, or it must be sacrificed in the market to pay the notes; that the quarry might not prove as good as it now appeared; and urged these facts, not before known to Daniels, as considerations to induce him to give a larger sum for the farm in exchange for the stock at par; that thereupon he decided to give the $6000, payable in stock at par, and a bond was accordingly drawn to secure the fulfilment of the bargain; that Fales had no agency, or instructions, or part in the business; that, on the 8th of December, Daniels, having received from Fales 240 shares in said company, made out to Fales and by him assigned to Warner, proceeded with it to Wrentham, and Warner caused a deed to be executed to him of the farm, on receiving the shares aforesaid; and declared at the time, he knew all about the stock, and more than the respondent; that no complaint was made to him by Warner about the trade, wishing to annul it, till August 18th, 1841.

The answer stated next, that Warner, on the 16th March, 1840, parted with all his stock except 24 shares; that he has no reason to believe the company to be a fiction, got up to defraud; but believes it possesses a valuable quarry of granite in Durham, N. H., examined and so reported by Dr. Jackson; that the quarry was bought by four persons in the fall of 1835, viz.: J. E. Fales, J. C. Thompson, James M. Thompson, and Newell A. Thompson, for $4500; that about $3500 were afterwards expended on it in roads, wharves, and shops, employing near fifty men there before they sold it to the company, and fully testing the good quality thereof; that several persons not interested there, united with those four in petitioning the New Hampshire legislature for an act of incorporation; and on the 10th of June, 1836, they were duly incorporated, and on the 25th of August ensuing, purchased the quarry for $53,000, payable ¼ in one year and ¼ in annual instalments thereafter; that the capital stock was divided into 2000 shares, at $100 each, and on the 7th of December, 1836, only 303 shares had been issued, on which 30 per cent. had been assessed and paid; that on

November 28, 1836, it was agreed to increase the number of shares to 8000, and to reduce the par value to $25 each; that the old certificates were to be renewed, and that on the 7th of December, Fales being the holder of 73 shares of old stock, surrendered them for 240 shares of the new stock, paying the difference by cash $10 and $3800 indorsed on the note he held against the company; that these are the same shares sold to Warner, and were paid for by the respondent by giving up to Fales his obligation before named for $5249 and the balance by a note, of which $400 was since paid in cash, and the rest by a note of Fales bought of a third person by Daniels; that Daniels has never mortgaged the land to *bewilder* Warner or defraud him, but for bona fide debts, since paid, and the mortgage of one debt was discharged about the 1st of February, 1842, before the filing of the bill in this case, and the other about the 25th of September, 1841; and denied all collusion with the mortgagees to defraud Warner, and all false statements in any way concerning the stock. The answer then proceeded to reply to the different interrogations in detail; in the course of which, it was averred, in addition to what has already been stated, that he owned no stock in the company before the 240 shares, nor any since except 40 shares; that the sums paid to the company by the stockholders are unknown to him; but he has been told and believes they have been $12,900, or $6900 beside the $6000 worth in dispute in this case. The old shares issued are stated to be 230, and the new 240. Most of the assessments and shares appear to have been paid by indorsements on notes the company owed, or for services done the company; and the cash for all does not seem to exceed from 100 to $1000, though some more is claimed, but is uncertain.

The answer of J. E. Fales accords in substance, so far as he knows anything, with Daniels's answer, and denies all joint interest in the subject-matter, or any coöperation together in the trade, or any agency on his part in it for Daniels or himself, though admitting he was one of the original purchasers of the quarry, and a member of the company and director, and under contract to convey shares to Daniels at his first interview with Warner, and so informed the latter: and that Colonel Bates was their agent at a salary perhaps of $1200, but not $1500, and had a clerk and a large number of hands employed, and were negotiating for various contracts; but denies he said any had been made, except at Portsmouth; or that any persons at Newport were imploring contracts; though he admits he stated that several persons there had bought into the company; that when Warner came to Boston, some days

before the 28th of March, 1836, Fales, at his request, introduced him to the president and clerk of the company; but denies any interest in the sale to him, or in the farm, or any misrepresentation then or before as to the company or its property, and denies that the company was a fiction, but avers that it originated and was organized and bought the quarry as before described; that there was nothing in the manner of conducting the company designed or likely to defraud; that at the time of this transaction the quarry was worked and a large quantity of stone sent to Portsmouth and New York, and large sums received therefor, and more stone was got out, which was attached by one of its creditors; that the first assessment on the shares was $25 and the next $25; and the certificates were not issued till the assessments were paid; that, at the time of the trade, he did entertain and express sanguine *opinions* in respect to the value of the stock; that it was worth its nominal value, and would pay a handsome dividend; and so Warner professed to think, after making certain estimates; that he said nothing about a brig or vessel to be commanded by Warner till near a year after the sale of the farm; that the land he obtained of Daniels for the shares was valuable, and its cost can be realized from it; though he has since taken the benefit of the bankrupt law in Massachusetts.

The answer of E. F. Fales and Scott accorded in respect to the mortgages to them, with what was stated in Daniels's answer.

Exceptions were filed to the answers of Daniels and J. E. Fales, for alleged omissions and evasions, and they both put in amended answers; Daniels denying that he furnished to Warner any estimates of the value of the stock, or stated as a fact its value; but averred that he insisted to Warner that he must inquire and decide for himself, and buy on his own judgment, if at all, and that Warner did inquire, and knew as much about its value as any one; that Daniels and Fales were not looking for a farm when the first interview took place, but the complainant applied to them to buy; that no mortgage remained on the Maine land sold to Fales, which prejudiced its value, and the consideration promised by Daniels for it had been paid to the extent of $4000 before the sale to Fales, and the rest since; that if the shares are now worth less than they were in 1836, it is owing to the general change in trade and enterprise; and their value in 1836 as compared with the farm was better known to Warner than to Daniels, and for aught Daniels knows, is now equal to the value of the farm; that since the trade with Warner, he has purchased 54 shares more in the company, of Newell A. Thompson, at $25 per share, by taking them at par in part

payment of some land sold to him; that Fales appears by the books to own since, 135 shares more, but how he obtained or paid for them is not known to the respondent Daniels; that the company had, in December, 1836, besides the property before stated, tools, carts, a blacksmith's and hammering shop, and various blocks of granite, partly hammered, all of several thousand dollars in value.

Fales, in his amended answer, adds only the following facts, which it is deemed material to state, viz.: that the company commenced issuing shares on the 24th of October, 1836; that on the 19th of November, the company owned the quarry and farm connected therewith, and buildings, wharf, forges, tools, shops, carts, several yoke of oxen, &c., and the real estate, subject to a mortgage for the purchase-money; that a large part of the purchase-money had been paid for by the proceeds of the stock sales at that time, and valuable additions made to the means of the company by aid and credit from individuals, and all had been duly appropriated; and that this was the subject of conversation with Warner when he came to Boston to inquire; and as the operations and organization were new, the value of the stock lay rather in estimate and opinions of what would be yielded thereafter, than in the intrinsic value of the quarry; that Daniels had paid $10,000 towards the Maine land, sold to him before their trade, and has since removed the mortgage then on it for the balance of the consideration; and that Fales at once took possession of that land, and exercised acts of ownership over it till sold by him in 1837; that one half of the original purchase-money for the quarry had been paid in cash before Warner's trade, and the balance was secured by mortgage; that $40,000 of the second purchase had been paid, and the rest secured by a second mortgage; and all this was made known to Warner before his trade.

The evidence in the case was voluminous, and will be further referred to in the opinion, so far as material to the facts, which are found to be proved satisfactorily, and which bear on the points of law decided by the court. The case was argued at great length at the October term, 1845, by *Jonathan P. Bishop* and *George M. Brown* for the complainant, and *Benjamin R. Curtis* for Daniels, and *Frederick W. Sawyer* for Fales, the respondents.

Woodbury, J. There was a preliminary objection in this case, as to the competency of the testimony of Scott and Gilbert, and G. C. Thompson, that must first be examined. Scott was brought in to defend, after the institution of these proceedings, on account of a mortgage of the premises to him by one of the respondents.

But it is now admitted, as well as proved, that his interest ceased before the bill was filed; and he denies, as do the rest of the parties, any collusion or combination with Daniels; and there is no witness in the case testifying to the contrary. It is proper, then, to say in the outset, that not being responsible at all, nor interested when he gave his testimony, it ought to be and is admitted. (1 Barb. Ch. P. 360.) *Murray* v. *Shadwell*, (2 Ves. & Beam. 401); *McDonald* v. *Neilson*, (2 Cowen 141.) If he was interested, he could not testify for his co-defendant. (3 John. Ch. 612.) The objections to Gilbert were, that a copy of the interrogatories was forwarded to him beforehand. But this does not render him incompetent, nor make his testimony inadmissible, as no comments accompanied them; and if they came from the respondents, the latter neither dictated nor wrote the answers, nor used any influence to shape them into any particular form. The letter to Thompson also merely requested him to tell the truth, without any suggestion as to what the writer of it considered to be the truth. The evidence of all of them is then properly in the case.

The grounds set up for relief on the merits, are, first, on account of an important mistake as to the value of the shares received in payment for the farm by the complainant; and secondly, on account of fraud, false representation and imposition by the respondents in making the exchange of the shares for the farm. In respect to the first ground, I do not think it tenable on the facts of the case here, though it is often a good ground for interfering when well supported. See cases in 3 Cowen, 537; 14 Ves. jun. 287; 2 Ves. 627; *Roosevelt* v. *Fulton*, (2 Cowen, 132); *Daniel* v. *Mitchell*, (1 Story R. 188.) I doubt its validity here, because, great as was the acknowledged difference between the real value of the shares and that supposed by the complainant when he took them, being as some of the witnesses testify, from nothing to a par value; yet he had means of avoiding much of the mistake, if there had not been falsehood and fraud. He was referred to the officers of the company, and to a personal examination of the property of the company, and allowed time for the purpose of full inquiry, and actually did consult the officers, as far as he deemed it useful to consult them. He relied then rather on the means pointed out and used by himself to get information as to most matters, than on the statements alone of the parties; and in such cases, generally, if a mistake as to a material fact occurs without any fraud or falsehood on the part of the respondent, no relief can be granted on account of the mistake alone. *Mitchell* v. *Daniel*, (1 Story Rep. 188); *Hough* v. *Richardson*, (Mass. Dist. May Tm. 1845); and *Atwood*

v. *Small*, (6 Clark & Finnelly); *Moffat et al.* v. *Winslow et al.* (7 Paige Ch. 124.) It is true that the facts, connected with his examination into the matter tend strongly to sustain the idea that the difference between the real and pretended value of the shares, in the rash and speculating mania of the times in 1836, could not then be detected by anybody so easily as now. Beside the times being so "out of joint," a mistake in the value, however great, could with difficulty, even after a very full scrutiny, have become manifest to one, who, like the complainant, seemed so infatuated and so bent on cheating himself. Under the general delusion which then prevailed, and the plausible mode adopted by the respondents to make the complainant seem rather to go forward than they, he acted on that occasion with what seems now an apparent determination to be duped, which would almost justify placing him under guardianship. Such circumstances rendered a mistake almost inevitable. But it is still doubtful whether it is remediable, when the means of judging were so opened to him, if no deception had been practised upon him, no concealments, exaggerations and falsehoods, which he had not the means to detect readily, nor the keenness to suspect or expose, and hence became their victim.

This brings us to the second ground for relief — fraud or imposition. In order to sustain that, the whole circumstances of the case, as well as the positive testimony, and the character and relations of the parties are all proper subjects of consideration. Courts of Equity can go more on what is called presumptive evidence, than those of law. (1 Story Eq. Jur. sec. 190; 2 Cowen, 129; *Roosevelt* v. *Fuller*, 1 Bro. Ch. C. 546.)

After examining all the facts in the general aspect, and then in detail, if the conclusion follows clearly that the complainant has been overreached, and that in some material degree, by impositions, or concealments, or misrepresentations, by the respondents, on which he properly relied, he ought to be relieved. (1 Story Eq. Jur. 192, s. 222; 7 Paige's Ch. 124; 2 Peere-Wms. 154; *Call* v. *Wallaston et. al.* 1 Simons, 37, 45; 2 Simons, 289; 1 Schoales & Lef. 429.) Nothing should in that event prevent relief, but great and unexplained neglect and delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy, which renders it impracticable for the court on any sound principle to grant redress.

The general and great feature of the whole case is, that the complainant, in 1836, from being a wealthy and prosperous farmer, is stripped of the whole by the respondents, through the transaction complained of. There does not seem to have been in him the im-

becility of mind which, though not idiocy, makes one liable to imposition, and calls aloud for the aid of a court of equity. (Story Eq. Jur. s. 103, 109; 2 Atk. 251); *Willis* v. *Lennegan*, (14 Ves. 290.) Nor does he appear to have been a man rash in character, or inexperienced in business; and the difficulty in the outset, under these facts, is to find any reason for this catastrophe, except in some fraud practised upon him in making the contract. Many circumstances in the transaction, whose truth is admitted, were calculated to mislead a common observer, such as the first interview seeming to be accidental, and not apparently sought by Daniels and Fales; such likewise as their referring him to the officers of the company for full information, and not hurrying the bargain; such as the reluctance of Daniels to exchange his stock for the farm at so high a price; and the respectability of the president and treasurer and the agent at Durham, and the geologist who certified; with the large number of persons employed, and the important contracts said to be negotiating, or made, by a company apparently authorized by law and duly organized, and with so much capital represented to have been fairly paid in.

But, amidst all this plausible exterior, it was a fact that the person introducing him to Daniels and Fales was a brother-in-law of one of them; and that the brother of that person was an owner of the stock, as is disclosed since his death. Yet neither of these circumstances appear to have been known to Warner. That the company was incorporated so as to appear larger and more imposing than it really was, by including in the charter several persons, not original purchasers of the quarry, nor owners of any of its stock; that it was organized, if at all, by those original purchasers; and its stock at first appears to have been entirely theirs, rather than belonging to others in some considerable amount at that time. That it thus converted the apparent sale of the quarry for $53,000 to others, merely into a real sale to themselves alone, — at first in a corporate capacity, by themselves in an individual capacity, and, in this way, they charged other stockholders who should afterwards buy in, the enormous difference between that sum and the seven or eight thousand dollars only, which was the original cost of the whole and the improvements. That, beside some of this being not disclosed fully to Warner, so far as any evidence is put in, the president and secretary were not proprietors of the stock originally, nor acquainted intimately with its concerns, nor was the agent, Bates; and the former had been induced to officiate in their stations under flattering assurances, which all failed, and for stock chiefly given to them for services, and which peculiar situation of theirs tended directly to mislead those confiding in their

general respectability and judgment, as members and purchasers of stock in the ordinary manner. That, instead of a large amount of capital having ever been paid in with money, as was represented, the treasurer swears he never received in that way over one hundred dollars; and, from the exhibits in the case, not over a thousand was probably at any time so paid; an important fact, unknown to Warner, for aught which appears, and contrary to the distinct admissions in Fales's answer. That the original proprietors of the quarry, as members of the company, or creditors of it, were still interested in all the stock, except two hundred and thirty shares, out of two thousand of the old emission, and two hundred and forty out of eight thousand of the new emission, instead of the new owners being numerous, and to a large amount, as Warner probably supposed; that inquiries of officers, who owned nothing, or only a few shares given to them for their services, and knew little about the company, were not likely to be very useful, but rather to mislead, as their information must have been chiefly obtained from parties deeply interested to make sales; that the geologist who reported on the quarry, did so before it had been much opened or worked, and had been induced by Fales to leave out the important facts of there being much more granite in the immediate neighborhood of this; and that every owner of the stock, and especially the original purchasers of the quarry, among whom was Fales, had a strong motive and interest, to the extent in all of near $50,000, in getting new owners of shares.

It is further manifest, that Daniels's representation of a number of persons in Newport having bought into the company, and which he admits he made, and which was calculated to have much influence on a purchaser, was unfounded. It is not supported by any proof; and the statements by him and Fales, as to the company being duly organized, which goes to the essence of the validity of the shares, and of the purchase of the quarry, and is denied in the bill, do not appear to be sustained from the records, the evidence proper for that purpose, in an issue like this, though they are by the oath of one of its officers, who aided to organize it. All this evidence on record, if existing, is in possession of the respondents, and is the best and suitable evidence of such a fact. *Deering* v. *Brown*, (6 Wend. 656); *Owing* v. *Speed*, (5 Wheat. 420.) It is also the suitable evidence to prove not only the organization, but the authority to buy the quarry, and execute the notes, issue the shares, and other material proceedings of the corporation. (1 Strange, 93.) This, and not the incompetency of the owners of the quarry to pass a title to a corporation, if duly or-

ganized and composed, chiefly or only of themselves as members, is the ground on which this part of the case is very defective, and leads to a strong presumption that radical objections exist to the regularity of the proceedings of the company in these important matters. It is charged in the bill, that the company was fictitious, and hence this point becomes material. But I should hesitate to decide the case on this objection alone, as the error may be one that could be removed by further evidence, and may have happened from an impression that it was the duty of the complainant to put in the record, or that the oath of the clerk was sufficient evidence to show the original organization, and the charter and acts done under it, as may suffice under different issues, and when the question is an incidental one. (3 Metcalf's R. 133, 282; 7 Ibid. 594.)

But, finally, it is manifest, further, that several misrepresentations very material, and calculated to mislead Warner, were made by both of the respondents. Thus, the statements which are admitted to have been made by both Daniels and Fales of the successful operations, then going on, viz., on the 19th of November, 1836, under the agent, Bates, and of the valuable contract which had been made, and was fulfilling at Portsmouth, and which were calculated to be very influential with Warner, or any other purchaser, and to be much relied on by them, as it was testing by experiment what was before theoretical as to the goodness and value of the quarry, were utterly unfounded, and known to be so to Fales, if not to Daniels. These were assurances not only relied on probably, but were material, distinct, not vague, and such as were proper to be relied on. *Town* v. *Newcomb*, (3 Merivale, 704); *Scott* v. *Harrison*, (1 Simons, 14.) They were the most important representations, next to the legal existence or continuance of the company itself, which could be made; and by Fales's own letter of October 5, to the agent at Durham, as well as by the agent's testimony, they were, not only then, on the 19th of November, known to be false, by Fales; but Fales, as early as the 5th of October, urged the agent to keep the truth concealed from the public, lest it might injure the value of the property. On this account Warner had not the means of detecting the groundlessness of those misrepresentations. The agent left Durham entirely, about the 1st of November, and went to New York for the company; and he left their employment the last of November. Daniels joined with Fales, or was principal, in all these last unfounded assertions, calculated to deceive Warner in most important particulars. He had opportunities to know, and must be presumed to know, if this be

necessary to charge him, that some of them were entirely groundless, and especially that one, made by him alone, concerning a large number of persons at Newport having bought into the company.

These, then, vitiate the transaction as representations untrue, on material points; and, if untrue by mistake, still vitiating as much by such a mistake in material matters as if there was a fraudulent design. *Daniels* v. *Mitchell*, (1 Story.) So it is the better opinion, that whether Daniels himself knew these accounts to be false or not, is immaterial, if they were false and influential, (1 Story's Eq. Ju. 193); *Graves* v. *White*, (9 Ves. 21); *Pearson* v. *Morgan*, (2 Bro. Ch. R. 389); *Shackleford* v. *Hadley*, (1 A. K. Marshall, 500.) So if Daniels himself had not made some of these false representations, but was present when Fales made them, and was benefited by them, it vitiates the transaction. *McMerkin* v. *Edwards and Nash*, (1 Hill's Ch. 193); (1 Grant's Ch. 267.) He adopts the contract, and these were a part of it — some of the *res gestæ*. He cannot take part and repudiate part, when the other contractor acts on the whole. The Portsmouth contract with the government, which Daniels admits he stated to Warner, in exhibiting the extent of their business and prospects, on November 19th, had also been obliged to be abandoned or transferred, at a loss of five hundred dollars, as early as October, from the unfitness of the stone to fulfil it. But this last fact seems to have been entirely concealed or suppressed; and *suppressio veri* is as bad as *suggestio falsi;* and it here related to a particular highly important in respect to the prospective value of the shares and the quarry. It was a fact, likewise, more within his own knowledge, and which it was his duty to disclose. (Story on Eq. Ju. sec. 147 and 197; 2 Kent C. 484.)

The agent employed, Colonel Bates, whose character is admitted to have been high, and to commend any business in which he was engaged, was spoken of to Warner, and his high salary as an evidence of the extent of their business; but the important facts were suppressed, not only that he had reported against the goodness of the quarry, but their inability, on that account, to fulfil the Portsmouth contract, and their failure to supply him his own salary, or with means for working the quarry further. So Dr. Jackson's report was printed and distributed, and a copy delivered to Warner; but the fact concealed that Fales had requested him to strike out what was said of other granite quarries near. These were extensive, and that fact, if known, would of course tend to diminish the value of theirs. It is difficult, also, to see why

Daniels should be so anxious to sell more of his stock to Whiting, as well as pay Warner only in this stock, if, as he represented, it was at par value in Boston; if the quarry was likely to yield a dividend in the spring, of seven per cent., if it was the best stock in the market, or if it was worth dollar for dollar; all of which considerations he urged on Whiting, in November, 1836, when Warner was present. His declarations about a week after, in trying to sell a note to Whiting, against the company, were of a like character, and hardly to be explained on any honest hypothesis. For he averred, that the company "would cash a demand against them at any time;" when, if true, why was he so anxious to sell the note? And why had Bates, the agent, been obliged to stop work in part for want of funds? And why had not the five hundred dollars been paid for the loss on the Portsmouth contract? And why had not the numerous other debts, and especially the original mortgage, been paid? And, if true, how were the means obtained, when only from one hundred or one thousand dollars, to the utmost, had ever been paid in by the stockholders? This last talk with Whiting is competent evidence, (*Bradley* v. *Chase*, 22 Maine, 511; 2 Hill, 248,) being on a subject of a kindred character, near the time of the transaction in question, and illustrating his intention. *Wood* v. *U. States*, (16 Peters, 360); 14 Ibid. 430; 1 Starkie on Ev. 64; 2 Ibid. 220; 1 Phillips on Ev. 179, Cowen's ed.; 2 Ibid. 452, 463; 4 Bos. and Pull. 92; 7 Bingham, 543.

The entire worthlessness of the shares soon became apparent to those officers who had been duped, as well as to several others. The whole estate, including the quarry, which had been mortgaged, was foreclosed, and went merely to pay the balance of the small amount of the original purchase-money. The tools, stone, &c., remaining, were attached to secure other debts; and the original purchasers of the quarry, having most of the stock of their corporation left on their own hands, became bankrupts, like Fales. Instead of $40,000 having been paid in on the shares, as Daniels alleges, the only receipts in money satisfactorily proved, were only from a hundred to a thousand dollars, but a drop in the bucket to their expenses; and the company thus, for aught which appears, ceased to be, not only without any legal existence, but, without credit or property, and exploded, as one of the worst among the thousand bubbles in the speculating mania of that period.

Often an entire failure of consideration in the receipt of what is mere moonshine, is sufficient to rescind a contract. *Terry* v. *Breck*, (1 Grant Ch. 367); *Chesterfield* v. *Jansen*, (2 Ves. 155);

1 Peere-Wms. 155, 156; *Dyer* v. *Rich*, (1 Metcalf, 180, 192.) It shocks the conscience on the face of the transaction, and is sometimes plenary evidence of fraud. But mere inadequacy of consideration may honestly occur, and often raises no certain presumption of deceit, (1 Story's Eq. Ju. 245, 246, sec. 244); as the difference may be small, or, if large, occurring from other causes than fraud, and more especially is this the case in speculating times like those of 1836. *Blackford* v. *Christian*, (1 Knapp P. C. 77; and 1 Brown Ch. Ap. 560.) It is not *per se*, fraud. 1 Cox R. 383; 8 Ten. 133; 3 Ves. & Beam. 180. To charge such a loss on an innocent purchaser of its shares, rather than on its projectors and early owners, would seem inequitable, if the contract had not been carried into effect; but even after that, if it turns out to have been carried into effect by fraudulent representations and falsehoods, on points very material, (*Smith* v. *Richards*, 13 Peters, 37), it would be derogatory to courts of equity and justice, if they could not, and did not lend relief. *Atwood* v. *Small*, (6 Clark & Finnelly, 232; 2 Ridgway P. Ca. 397); *Jackson* v. *Ashton*, (11 Peters, 229); *Osgood* v. *Dicklin*, (2 John. Chan. 23); *White* v. *Dame*, (7 Ves. Jun. 30; 18 Ibid. 335; 2 Milne & K. 552.)

The points here, where misrepresentation occurred, were manifestly material, as they should be, to permit a ground for our interference. *Phillips* v. *Duke of Bucks*, (1 Vern. 297.) Nor is this a case of clear and sufficient redress at law. The aid of a court of chancery was indispensable to obtain the discovery of most of the important facts in the case; and hence an application for relief here can well be sustained on, and in connection with, that discovery, notwithstanding the 16th section of the judiciary act of the United States, requiring us to refuse aid in chancery when it can be obtained at law.

I do not find it necessary to consider several other matters, pressed at the hearing, or if not pressed, disclosed in the pleadings and evidence. These, to which I have now referred, rest on facts admitted, or clearly proved for the complainant, and not disproved on the part of the respondents by proper evidence. These also give the case a direction that seems to accord with the broad face of the whole transaction. They will work no injustice to any one, as the result will be merely to place the parties in *statu quo*, as they stood before November 19th, A. D. 1836.

The only remaining objection is the length of time that has since elapsed. But it appears that steps have been taking to obtain this relief, since 1840. That the complainant was induced to believe for some years that the revulsions in the times were the cause of

the works not going on; that till about 1840 he was not aware he possessed a remedy in chancery; and that the shares and the farm have not been used or affected by the delay since, so as to render a rescinding of the contract either impracticable or inconvenient. The value of neither appears to have materially changed since, which when happening, sometimes constitutes an objection. (5 Mason, 244; 3 Harris & McHenry, sec. 334; and Cranch, 471, and Clark and Finnelly, 650.) Length of time unexplained may sometimes be a bar short of the statute of limitations; but if fraud exists, or the delay is accounted for, it is no bar. See 2 Scho. and Lefr. 629; 2 Bro. Ch. C. 630; 17 Ves. 98; 7 Johns. Ch. 90; Angel on Limitations. *Hough* v. *Richardson*, before referred to, and *Vigas* v. *Pike*, (8 Clark and Fin. 562); *Sanborn* v. *Stetson*, (2 Story's R. 481 – 488; 1 Howard's R. 192.) So it will not be a bar by analogy to the statute, as to length of time, if such a course would work injustice. 2 Story's Eq. Ju. sec. 15, 21; Collier, 58; 1 John. Ch. 316; 2 Ves. Jun. 571; 1 Atk. 493; 10 Ves. Jun. 466, 467; 12 Ibid. 266, 374; 1 Ibid. 374; 14 Ibid. 91; Cooper Ch. C. 204; 20 John. 58, &c.

If either party cannot restore the property in good condition, that may be a good ground for not rescinding; but, at the same time, damages can be and should be given instead of rescinding, if necessary to enforce what is just, and the case is properly in chancery. Thus, if the inability to restore happens by the course of the complainant, it should not prejudice him in getting some kind of relief, if he was not then aware of the fraud. (3 Little, 366.) But if damages alone are sought, and alone can be given, and the fraud related to personal property, the relief is usually at law. *Russell* v. *Clark*, *Ex.* (7 Cran. 84.) Though some cases hold otherwise, even there. *Evans* v. *Bicknell*, (6 Ves. 182); *Bacon* v. *Bronson*, (7 John. Ch. 201); Story's Eq. Ju. sec. 184, &c. But it could not be held otherwise in the United States courts, under the clause in the judiciary act, if the remedy at law be complete, since there, as before remarked, it is provided, resort shall be had to law, rather than equity.

In cases of fraud in the sale of real estate, as here, when a court of equity can set aside the sale, and a court of law cannot, the jurisdiction of the former is usually held to be clear. 1 Bibb R. 244; 1 Story's Eq. Ju. sec. 184, et cet.; 2 Ibid. sec. 798, 799, et cet.; *Stephens et al.* v. *Dunlap*, (1Wheat. 197.) So the jurisdiction in equity is clear, where a discovery is sought as here. In relation to the sale in this case, then, let it be rescinded, and the shares

conveyed by Warner to Daniels, and the farm by Daniels to Warner, and a master be appointed to report the amount of rents and waste (after deducting permanent improvements) that, in the mean time, should be allowed to Warner by Daniels. (1 Bibb R. 244); *Daniels* v. *Mitchell*, (1 Story's R.)

It appears, I think, from the printed case, that when it was made up, Daniels still owned, and was in a situation to reconvey, the farm, and that Warner, though the shares stood in his son's name as owner, still probably could control and reconvey them. Should such still be the case, it can be closed, as just directed, without any complexity, or resort to any estimate of damages, on the master's reporting. But if the condition of either party should be materially altered in this respect, it will be proper to provide for it, if the power and right to do so exist in this court. Some cases hold, that if either party, pending the proceedings, sells the property, so that he cannot reconvey, damages alone should be given, though not in other cases. *Todd* v. *Gee*, (17 Ves. 274); 1 Cox, 558. But some authorities hold, that in all cases, where the jurisdiction in equity has once attached clearly to the case, damages alone may be given, whenever reasonable, and may be estimated, either by a master in chancery, or on an issue *quod damnificatus* to a jury. (See cases cited in 2 Story's Eq. Ju. sec. 794 – 799; 9 Cranch, 493; 1 Peere-Wms. 570; 4 Ves. 497; 3 Atk. 512.)

If, contrary to expectation, then, neither the land nor the shares can be reconveyed, the master can hereafter examine and report the damages done to Warner by the misrepresentations of Daniels and Fales, and a decree be entered against them for the amount. If the farm can be reconveyed, and not the shares, the former can be done, and the net income ascertained and paid as before directed, — the value of the shares, if anything, in December, 1836, and interest since being reported by a master, and deducted therefrom. In rescinding a contract, it seems reasonable to adopt a rule like that in enforcing a specific performance, which is, to go as far as you can, *pro tanto*, and give proportionate damages for the residue. (2 Story's Eq. Ju. 779, sec.); *Porter* v. *Rogers*, (1 Ves. and Beam. 351.) Should the facts, therefore, require more than what has first been proposed by mutual reconveyances, I am prepared to go further according to what seems to me to be sound principle, sustained by several precedents, in addition to what has already been cited.

The parties in this case come here for discovery and relief, and have obtained the former, when it could not be had in a court of

law; and, in order to make the redress perfect, if third persons have since become interested in the property, so that the fraudulent sale cannot be set aside, and a reconveyance made of the whole, the relief for damages becomes necessary and proper, either in part or in full. Thus in *Pratt et al.* v. *Law and Campbell*, (9 Cran. 494,) in a bill in equity, where a contract has been partly performed, and the rest, that is, other lots, cannot be conveyed specifically, because sold, &c., the court can make an issue *quod damnificatus*, and decree the amount, or, without it, make the party pay the ratio of the price given for all, which the deficiency of lots bears to all. So in *Woodcock* v. *Bennet*, (Cowen, 711,) in a prayer for a specific performance, it was held that the court may refer it to a master to assess the damages, and not dismiss the bill, because they cannot enforce a specific performance, the land having been conveyed away. (1 Fontleroy, 38, in q. and 165, int. b; 1 Cox R. 258; 3 Atk. 512–517; 1 P. Wms. 570); *Cobb* v. *Waterville*, (2 Ibid. 304); *Dexter* v. *Stewart*, (1 Cox, 258); *Greenaway* v. *Adams*, (12 Ves. 401.)

The bill, then, must be dismissed as to E. Fales and Scott, and a final decree entered against Joseph Fales and Daniels, on the principles above set out, and costs.

Supreme Judicial Court, Massachusetts, July, 1846, at Boston.

FIFTY ASSOCIATES *v.* MALACHI HOWLAND.

The summary process for ejecting a tenant who holds possession of the demised premises, after the determination of the lease, either by its own limitation, or by a notice to quit, provided for in the Revised Statutes of Massachusetts, ch. 104, s. 2, cannot be supported by a failure on the part of the tenant to perform the terms of the lease, where the lease is given on condition that, in case of such failure, the lessor may enter and expel the lessee.

Such a proviso in the lease is a condition, and not a conditional limitation; and the lessee's estate does not cease until the entry of the lessors for a breach of the condition.

THIS action was founded on the Revised Statutes, ch. 104, sec. 2, which provides that when the lessee of any lands and tenements, or any person holding under such lessee, shall hold possession of the demised premises, without right, after the determination of the lease, either by its own limitation, or by a notice to quit, as provided in the 60th chapter, the person entitled to the premises

may be restored to the possession thereof, by a summary process, in the manner provided in the 104th chapter. This action was originally commenced in the justices court, and was from thence carried to the court of common pleas; and the case now came before the supreme judicial court, on the defendant's exceptions to the rulings of that court on the trial; the court below having ruled in favor of the plaintiffs' right to maintain this process; under which ruling the jury returned a verdict for the complainants.

Charles A. Welch, for the complainants.
P. S. Wheelock, for the defendant.

Wilde, J. The principal question is, whether the defendant, at the time of the commencement of the action, did hold possession of the demised premises, without right, after the determination of the lease by its own limitation, for no notice to quit as provided in the 60th chapter was proved or alleged. The lease under which the defendant held a part of the demised premises, under Alfred Randal, the lessee, was for the term of five years, which term had not expired when this action was commenced, but the plaintiffs' counsel rely on a proviso in the lease, which, it is contended, is to be construed as a conditional limitation of the estate demised, and if so, undoubtedly this summary process may be well maintained. The words of the proviso are: — "Provided always, and these presents are upon this condition, that if the lessee, or his representatives or assigns, do or shall neglect or fail to perform and observe any or either of the covenants herein before contained, which on his or their part are to be performed, then, and in either of said cases, the said lessors or those having their estate in the said premises, lawfully may immediately, or at any time thereafter, and while such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof in the name of the whole, repossess the same as of their former estate, and expel the said lessee, and those claiming under him, and remove their effects (forcibly if necessary) without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenant."

The question then, is, whether the words of this proviso are words of condition, or conditional limitation. The distinction is correctly laid down by Blackstone (2 Com. 155,) thus: When an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is de-

nominated a limitation; as when land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, and the like. In such case the estate determines as soon as the contingency happens, and the next subsequent estate, which depends on such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, on condition, as if granted expressly upon condition to be void upon the payment of £40 by the grantor, &c. the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or claim in order to avoid the estate. According to this distinction, which is fully supported by the authorities, it seems quite clear that the words of the proviso in the lease created an estate on condition, and cannot be construed as words of limitation. The estate of the lessee was not to cease or become forfeited by his non-performance of the condition, *before the entry of the lessors;* and if no such entry had been made, the estate of the lessee would have continued to the end of the term. So, if the lessors had, after the breach of the condition by non-payment of rent, accepted the rent in arrear, it would have been a waiver of the forfeiture, after which the lessors could not enter for the breach of the condition; and so is the language of the proviso. The provision is, that after the breach of the condition by the lessee's non-performance of any of his covenants, "the lessors may lawfully immediately or at any time while such neglect or default continues, and without further notice or demand, enter into and upon the premises, and repossess the same as of their former estate." Until entry, therefore, the lessee's estate continued, notwithstanding the breach of the condition. By the words of the proviso, the lessee's estate is expressly declared to be an estate upon condition; and Lord Coke says, in *Mary Portington's Case*, (10 Co. 35) that if there be express words of condition annexed to the estate, it cannot be construed a limitation. But this rule of construction was denied by Lord Hale to be law in all cases; for, as he held, although the words be proper to create a condition; yet, if upon the non-performance thereof the estate be limited over to another person, this shall be a limitation; for it shall not be in the power of the grantor or lessor, by his not claiming, or entering, to defeat the interest of such person, and this seems to be a well-founded exception to the general rule of construction as laid down by Lord Coke, but it is not applicable to the present case. (Bac. conditions, H. Roll. Abr. 412; Ven. 200; 2 Wooddes. 143.) No right is reserved to the plaintiffs except to repossess their former estate by entry after

condition broken. It follows therefore, conclusively, that the lessee's estate was not determined by the limitation in the lease, but by the lessor's entry for condition broken, if that was legally made; as to which it is not necessary to give an opinion; for, if the condition was valid, and the entry of the plaintiffs lawful, they are not entitled to maintain this summary process under the statute to recover possession. The exceptions are therefore sustained, and a new trial ordered at the bar of this court.

CHARLES WHITING ET AL. *v.* IRA W. LEWIS.

A debt, due from one citizen of Massachusetts to another, contracted while the bankrupt law of the United States was in operation, and while the insolvent law of Massachusetts was suspended, may be discharged under proceedings commenced under the insolvent law, after the repeal of the bankrupt law and the revival of the insolvent law.

THIS was an action on a promissory note. The defence set up was a discharge under the act for the relief of insolvent debtors. The debt was contracted during the time when the insolvent law of Massachusetts was suspended, on account of the bankrupt law of the United States. After the repeal of the bankrupt law, the defendant petitioned for the benefit of the insolvent law, and at the second meeting of his creditors the master in chancery granted him a certificate of discharge. The plaintiff contended that the insolvent law could not operate to discharge debts contracted while it was not in operation.

Charles B. Goodrich, for the plaintiff.
A. Prescott, for the defendant.

SHAW, C. J. delivered the opinion of the court. Although the insolvent law was suspended during the operation of the bankrupt law, it was not annulled. The bankrupt law, being the supreme law of the land under the constitution, would have suspended the force of the state insolvent laws as effectually, if the statute, declaring the insolvent law suspended, had never been passed. But the legislature very properly, to save any question upon the point, passed an act declaring it suspended. On the repeal of the bankrupt law, it revived, and took effect as an original enactment, and stood as a law passed in 1838. It was argued that a state insolvent law could not affect debts contracted before its passage. This principle was a correct one, but it applied to the original enactment of the law, and not to its revival after a temporary suspension. The discharge was therefore a good defence. Judgment for the defendant, on the agreed statement of facts.

Digest of American Cases.

Selections from 1 Denio's (New York) Reports.

(Continued from page 136.)

NUISANCE.

5. The defendants being proprietors of a distillery in the city of Brooklyn, were in the habit of delivering their *grains* remaining after distillation, called *slops*, to those who came for them, by passing them through pipes to the public street opposite their distillery, where they were received into casks standing in wagons and carts; and the teams and carriages of the purchasers were accustomed to collect there in great numbers to receive and take away the article; and in consequence of their remaining there to await their turns, and of the strife among the drivers for priority and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon: *held* that the defendants were guilty of nuisance. *The People* v. *Cunningham*, 524.

6. The consideration that the teams and carriages were not owned by the defendants, or under their control, does not excuse them, they having in effect, by the manner of conducting their business, invited those assemblages at the point where the article was delivered. *Ib.*

7. Proof of strife and collision among the drivers, while awaiting their turns, is competent evidence towards establishing the fact of obstruction. *Ib.*

8. A temporary occupation of part of a street or highway by persons engaged in building, or in receiving or delivering goods from stores or warehouses or the like, is allowed from the necessity of the case; but a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable. *Ib.*

OFFICE AND OFFICER.

Where a party justifies under the order of an officer having a special and limited jurisdiction, he must show that the officer had jurisdiction of the subject matter and of the parties to the controversy, and that the order was such an one as the law authorized the officer to make. *Bennett* v. *Burch*, 141.

2. There is, however, this qualification to the rule above stated, that where the order on its face is such an one as the officer may make, another officer, for whose guidance and control it was made, may justify under it, without showing jurisdiction in the particular case. *Ib.*

3. An officer authorized to grant orders to hold to bail, acts judicially in making such orders, and is not liable for false imprisonment, in consequence of an arrest upon process, on which he had indorsed an order upon an insufficient affidavit, where it presented a case for the exercise of his judgment. *Harman* v. *Brotherson*, 537.

4. Where a duty, judicial in its nature, is imposed upon a public officer or a municipal corporation, a private action will not lie for misconduct or delinquency in its performance, even if corrupt motives are charged. *Wilson* v. *The Mayor, &c. of New York*, 595.

5. The same principle prevails where the party on whom the duty devolves, though not a judge, is clothed with discretionary powers, to be exerted according to his sense of fitness and propriety. *Ib.*

6. If such officers act corruptly, they are liable to impeachment or indictment. *Per* BEARDSLEY, J. *Ib.*

PARTNERSHIP.

A plea in abatement, in *assumpsit*, setting up the non-joinder of a joint contractor, is not supported by evidence of a partnership in the subject of the contract, between the defendant and the person named in the plea, where it was proved that the defendant contracted in his own name without mentioning any partner, and the plaintiff had no knowledge that any other person was concerned with the defendant. *Peck* v. *Cowing*, 222.

2. Where the plaintiff sold property to a firm consisting of two partners, and took the individual note of one of them for the price, payable to his order, which he indorsed and procured to be discounted, and the holder, after it became payable, sued and recovered judgment against maker and indorser, which judgment was paid by the plaintiff; *held*, that the plaintiff could not maintain an action for goods sold, against the partners, the original cause of action being merged in and extinguished by the judgment, nor for money paid, the maker only being liable to such action. *Peters* v. *Sanford*, 224.

3. A person in business may employ another as a subordinate, and agree to pay him a share of the profits, if any shall arise, as a compensation for his services, without giving the person so employed the rights, or subjecting him to the liabilities of a partner. *Burkle* v. *Eckart*, 337.

4. A firm of merchants engaged in general business, and trading, among other things, in provisions, employed a third person to attend to the purchasing and forwarding of produce, who was to act under the orders of the firm, and have as a compensation for his services one-fourth of the profits arising out of the purchase and sale of produce; *held*, that the person thus employed was not a partner in the business, even in respect to third parties. *Ib.*

5. Where the members of a copartnership agree that the business of the concern shall be carried on by and in the name of *one of the copartners*, such name, for the purposes of the business of the firm, is its copartnership name, and by it the several members are bound. *The Bank of Rochester* v. *Monteath*, 402.

6. So where the copartners agree that the business shall be carried on by and in the name of an individual not himself interested, *his* name is the copartnership name, and is binding upon the firm when used in its business. *Ib.*

7. Where the proprietors of a line of canal boats, by articles between themselves, agreed that the business of the concern *at Rochester* should be conducted by J. A., one of the proprietors, in his own name, and that *at Albany* it should be conducted by W. M., an agent, in *his* name, but in behalf of and upon the responsibility of the defendants, who were two of the proprietors; that no copartnership name should be used, and no paper made, accepted or indorsed in the name or on account of the copartnership; and that each party should raise his share of the money needed by the concern upon his own responsibility, and the other parties were not to be liable therefor, but all the parties were to share equally in the profits: *Held*, that a bill of exchange drawn by J. A. in his own name to raise money for the business of the concern, upon, and accepted by W. M. in *his* name, and which was discounted by the plaintiffs, bound all the proprietors as *acceptors*. *Ib.*

8. *Held further*, that all the proprietors were chargeable as *drawers;* and that no notice of non-payment was necessary, the drawers and acceptors being the same persons; *and also* that the fact that the paper was drawn contrary to the agreement among the partners, did not affect third persons who took it without notice. *Ib.*

9. In such a case, *it seems*, that the plaintiff cannot recover on a count for money lent, without showing that the avails of the draft actually went into the copartnership business. *Per* BRONSON, C. J. *Ib.*

10. The partners of a firm, by adopting and using in their business the name of a single individual for that of their firm, will subsequently be bound by the use of such name, to the same extent as though they had used the ordinary name of their firm. *Palmer* v. *Stephens*, 471.

11. Where the partners of a firm have a copartnership name which they ordinarily use, they will not be bound by the use of a new name, unless it be shown that all the partners have assented to the use of such new name, or that

the partner who was entrusted with the control and management of the business of the firm had so assented. *Ib.*

PERSONAL PROPERTY.

Though grass, growing, is in general parcel of the realty, yet where it is owned by one who does not also own the land, it is personal property, and may be mortgaged and sold as such. *Per* JEWETT, J. *Smith* v. *Jenks*, 580.

PLEADINGS.

In assumpsit by husband and wife, the declaration must state the interest of the wife in the contract; and for the want of such statement in this case, the judgment was arrested. *Thorne* v. *Dillingham*, 254.

2. In general, the wife cannot be joined as plaintiff with her husband in an action on a contract made during coverture; but where she is the meritorious cause of action, and there was an express promise made to her, she may be joined. *Per* BEARDSLEY, J. *Ib.*

3. In such case the declaration must state the facts necessary to bring it within the exception. *Ib.*

4. Where, in an action by husband and wife, the plaintiff's case was, that while the wife was sole, money had been paid by a third person to the defendant's testator, to be enjoyed by him during life, and then to be paid to her; *held*, that the plaintiffs could not recover on a count for money had and received, but should have declared specially. *Ib.*

5. A plea of a discharge obtained upon a voluntary application under the bankrupt act must state positively that the defendant at the time of presenting his petition was "*owing debts*," &c. It is not enough that such fact is stated to have been contained in the petition presented to the district court. *Varnum* v. *Wheeler*, 331.

6. A plea of a bankrupt discharge must show that the plaintiff's debt is not of the class mentioned in the first section of the act as having been created *in consequence of a defalcation as a public officer, or as executor, &c.* *Maples* v. *Burnside*, 332.

7. Whether a replication to a plea of a bankrupt discharge, averring generally that the discharge was obtained through fraud and wilful concealment of the bankrupt's property, accompanied by a notice specifying the acts of fraud and concealment, is good, *quere*. *Ib.*

8. In an action for a publication, charging the plaintiff with being in bad repute in a particular county, it is a good plea that the plaintiff resides in and is known in the county named, and there sustains the reputation of "a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal and litigious man." *Cooper* v. *Greeley*, 347.

9. In such an action a plea averring generally that the plaintiff, residing in and being known in the county in question, had acquired a bad reputation there, is good. *Ib.*

10. Where the plaintiff is charged with the reputation of having committed a particular offence, or with having neglected some particular duty, the defendant cannot rely upon the reputation charged, but must aver and prove the plaintiff actually guilty. Such a case is distinguishable from one where *general* bad reputation is charged. There the plea may allege the existence of such reputation merely. *Per* JEWETT, J. *Ib.*

11. A plea answering only part of a count, is bad, though other parts are answered by other pleas, and the general issue is pleaded to the whole declaration. *Ib.*

12. Upon demurrer the court gives judgment against the party committing the first fault, if the defect is one of substance. *Lipe* v. *Becker*, 568.

13. A plea in abatement setting up the misnomer of the defendant commencing "And *the said* Basil W., against whom the said plaintiff has exhibited his declaration by the name of *Baswell* W., comes and says," is bad on special demurrer. It should commence "And Basil W." &c. *Per* JEWETT, J. *Hyde* v. *Watson*, 670.

PRINCIPAL AND AGENT.

Where an agent acts in his own name, he binds himself and not his principal. *The Bank of Rochester* v. *Monteath*, 402.

2. Where one executes an instrument in the name of another, assuming to be his agent, but having in fact no authority for that purpose, he is himself bound as a principal. *Palmer* v. *Stephens*, 471.

3. Whether this rule would apply in a case where the name of the assumed agent did not appear on the paper, *quere*. *Per* BEARDSLEY, J. *Ib.*

4. To exempt the party assuming to be agent from the operation of this rule, it must appear that he was such when he signed the instrument. A subsequent ratification by the party named as principal would not affect the question. *Ib.*

5. The defendant, a clerk of a mercantile firm, consisting of Gideon Stephens and three of his sons, who ordinarily transacted their business under the name of G. Stephens & Sons, having authority to make notes in behalf of the firm, but not in behalf of Gideon Stephens individually, made a note to the plaintiff upon a partnership transaction and signed the same *G. Stephens*, adding his own initials; *held*, that the defendant was himself liable on the note, unless it were shown that the firm was bound in consequence of having adopted the name of G. Stephens as a proper name to designate such firm in the transaction of its business. *Ib.*

PRINCIPAL AND SURETY.

The defendant having in his possession a promissory note payable to the plaintiffs, a banking corporation, or order, made by three persons, two of whom, whose names stood last, had added the word "surety" to their signatures, indorsed his own name on the back and procured it to be discounted at the plaintiff's bank; there being no proof of the origin of the note, *held*, that although among the makers the last two were sureties for the first, yet *all* the makers were the primary debtors of the plaintiff, and the defendant stood in the light of *their* surety, and was therefore entitled to show in his defence that the plaintiffs had, by an arrangement with the makers, extended the time of payment. *Bank of Orleans* v. *Barry*, 116.

RELEASE.

The word "demand" in an acquittance is more comprehensive than any other, except "claim;" and when used in a release, all causes of action and all rights whatever are extinguished. *Per* BEARDSLEY, J. *Vedder* v. *Vedder*, 257.

2. The plaintiff having a cause of action against the defendant for a *tortious* entry by the latter upon his land and causing a nuisance thereon, from which damages ensued, upon sufficient consideration, discharged the defendant from all demands, and *afterwards* the plaintiff sustained damages by the *continuance* of the nuisance; *held* that such discharge extinguished all right of action, not only for the original injury and the damages up to that time, but for all future damages occasioned by the nuisance. *Ib.*

3. If the defendant had placed the nuisance upon his own land, and the plaintiff's demand was for consequential damages only, a discharge by the plaintiff would not have extinguished the right of action for *future* damages. *Per* BEARDSLEY, J. *Ib.*

SALE AND DELIVERY OF GOODS.

Where, upon a sale of personal property, consisting of heavy articles, as lumber, lying upon a dock, which had been previously measured, the vendor and vendee, being at the place where the property is, agree upon a sale by words *in presenti*, and there is nothing to be done to ascertain the quantity, quality or value of the articles, and then payment is postponed till another time, or till the happening of some other event, the property is deemed to be delivered and the sale is complete. *Shindler* v. *Houston*, 48.

2. Plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock and in the view of the parties at the time of the bargain, and which had been before that time measured and inspected. The defendant offered a certain price per foot, which being satisfactory to the plaintiff, he said, "the lumber is yours." The defendant then told the plaintiff to get the inspector's bill of the lumber and take it to one House, who was the defendant's agent, and who he said would pay the amount. This was soon after done, but payment was refused. The price being over fifty dollars, and the statute of frauds being relied on, it was *held* in an action for the price of the lumber, upon a declaration for lumber sold and delivered, that the court below was right in refusing to charge that the furnishing of the inspector's bill was a condition precedent,

or that the property did not pass at the time of the bargain; and that the facts were properly submitted to the jury with instructions that they might find an absolute delivery and acceptance of the lumber at the time of the bargain, and that the payment was postponed and credit given therefor until the inspector's bill should be presented to House. *Ib.*

3. It is not necessary, in order to terminate the vendor's right of *stoppage in transitu*, that the goods, after arriving at the place of delivery, should have come to the *corporeal* possession of the consignee. A *constructive* possession, or the exercising of acts of ownership by the consignee after such arrival, is sufficient. *Per* BRONSON, C. J. *Mottram v. Heyer*, 483.

4. The defendants, merchants in New York, ordered a cask of hardware from the plaintiffs, who were manufacturers in England, and it was shipped on board a vessel which arrived in New York on the 7th of April, on which day the defendants, having received the bill of lading, paid the freight, and on the 9th of April *entered* the goods at the custom-house. After this they were taken to the public store, and while remaining there, and before the duties were paid, the defendants having become bankrupt, the plaintiffs' agent, on the 28th of April, demanded the goods of the defendants; *held*, that the *transitus* had ended when the demand was made, and that the plaintiffs had no right to stop the goods. *Ib.*

5. *It seems*, the case would have been different if the freight had not been paid, or if no *entry* of the goods had been made. *Per* BRONSON, C. J. *Ib.*

6. Upon a sale of merchandise for cash to be paid on delivery, the defendant offered the plaintiffs' servant, who made the delivery, a note of the plaintiffs which had become payable, for nearly the amount, and cash for the residue, which the plaintiffs declining to receive, the defendant refused to give up the goods, or pay the money; *held*, that no title passed, and that the plaintiffs could maintain replevin for the property. *Leven* v. *Smith*, 571.

SLANDER.

The privilege of parties, and of attorneys, solicitors and counsel, in respect to words or writing used in the course of judicial proceedings reflecting upon others, is limited to matter which is pertinent and material; and within that limit the protection is complete, and malice cannot be predicated of what is so said or written: but where a party or an attorney, or counsel in such a proceeding goes out of the way to asperse and vilify another by words or writing not material or pertinent to the controversy, he is without protection, and is liable to be prosecuted as in other cases of slander or libel. *Gilbert* v. *The People*, 41.

2. Where one acting as counsel for the plaintiff in a justice's court prepared and presented a declaration in an action of trespass for breaking the plaintiff's close and killing and otherwise injuring his sheep, in which, among other provoking expressions concerning the defendant, was inserted allegations that the defendant was "reputed to be fond of sheep, bucks and ewes, and of wool, mutton and lambs," and to be "in the habit of biting sheep," and it was added that "if guilty, he ought to be hanged or shot," it was *held* that an indictment charging such matter as libellous and alleging malice, was good on demurrer. *Ib.*

3. Where a declaration in slander stated a complaint before the grand jury, and that the plaintiff was sworn and gave evidence upon such complaint, and contained a *colloquium* concerning the evidence so given, and charged the defendant with having spoken words in themselves imputing perjury to the plaintiff in giving such testimony; *held*, that the action could not be sustained without proof of such proceedings before the grand jury. *Emery* v. *Miller*, 208.

4. The case of *Jacobs* v. *Filer*, (3 *Hill*, 574,) commented on and explained. *Ib.*

5. Where it was proved that the defendant had said of the plaintiff that he had stolen "the Spaniard's money," such words being laid without any averment or colloquium respecting the loss or stealing of such money; *held*, that the plaintiff was not entitled to prove a report in the neighborhood that a Spaniard's money had been stolen. *Ib.*

6. Where words are actionable only on account of the official or professional character of the plaintiff, it is not

enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him *in that character*. *Van Tassel* v. *Capron*, 250.

7. The declaration charged the speaking of the following words of the plaintiff in his character of a justice of the peace: "There is a combined company here to cheat strangers, and 'Squire Van Tassel has a hand in it. K. A., J. G., and 'Squire Van Tassel are a set of damned black-legs;" but it did not show that the imputation was connected with the plaintiff's official conduct; *held*, not actionable. *Ib.*

8. Words charging the plaintiff, a justice of the peace, with omitting to inform a party who had recovered a judgment before him, of the fact that the constable, who had the execution, had rendered himself liable for not returning the same in time, do not impute official misconduct. *Ib.*

9. An action for words will not lie against a party who speaks in the performance of any duty legal or moral, public or private, or in the assertion of his own rights, or to vindicate or protect his interest, without proof of express malice, though the charge imputed be without foundation. *Per* BEARDSLEY, J. *Thorn* v. *Moser*, 488.

10. Where the defendant had a forged check passed to him by a stranger, and afterwards a relative of the plaintiff having heard that the defendant had charged the plaintiff with the forgery, of his own accord applied to the defendant, (saying, however, that he came at the plaintiff's request,) for information respecting the charge, and to convince the defendant that he was mistaken, and thereupon the defendant told him that the plaintiff was unquestionably guilty, and proposed to arrange the matter by receiving the amount obtained on the check, and on that occasion persisted in the charge after being warned not to do so; *held*, that the conversation was not privileged, and that the plaintiff was entitled to recover without proof of express malice. *Ib.*

11. Nor would it be privileged if the plaintiff had actually procured the person to go to the defendant for the purpose mentioned. *Per* BEARDSLEY, J. *Ib.*

TRIAL.

Where, in an indictment against three persons for misdemeanor, distinct offences were charged in different counts, and on the trial, the defendants being tried together, the evidence tended to show that two crimes had been committed, and when the prosecution rested there was no evidence against one of the defendants in respect to one of the offences charged, though there was testimony tending to show them all guilty of the other offence, and the defendants applied to the court to compel the prosecutor to elect for which offence he would proceed, it was held that he should have been required to make such election. *The People* v. *Costello*, 83.

2. Such application being addressed to the discretion of the court, before which the trial took place, whether a decision denying it could be corrected by this court upon a bill of exceptions, *quere*. *Ib.*

WARRANTY.

In executed contracts for the sale of personal property, where there is neither fraud nor express warranty, the purchaser takes the property at his own risk, as to its quality and condition. *Moses* v. *Mead*, 378.

2. The case of a sale by sample, where a warranty is allowed to be implied, that the bulk of the article corresponds in quality with the sample exhibited, forms a well-established exception to the general rule. *Per* BRONSON, C. J. *Ib.*

3. Where *provisions* are sold as merchandise, (and not for immediate consumption by the purchaser,) there is no implied warranty of soundness. *Ib.*

4. *It seems*, that where provisions are sold for *domestic use*, the law presumes that the seller is acquainted with their quality, and he is liable to the purchaser if they turn out to be unwholesome. *Per* BRONSON, C. J. *Ib.*

Notices of New Books.

THE AMERICAN LAW OF REAL PROPERTY. By FRANCIS HILLIARD, Counsellor at Law. Second edition, revised, corrected, and enlarged. In two volumes. Philadelphia: Lea & Blanchard. 1846.

THE first edition of this work was published in 1838. That it has borne the test of practice and experience is shown by the fact that another edition is now called for, which, from the slight examination we have already made, we do not hesitate to pronounce a decided improvement upon the first, the work having been brought down to the present time by the addition of English and American cases decided, and statutes enacted, since it was first published. The new matter, incorporated into the text and notes, enlarges the book at least one fourth from its original size.

Before the appearance of Mr. Hilliard's work, Mr. Cruise's Digest of the Laws of England respecting Real Property, was indispensable to the American lawyer, and had passed through several editions in this country. It has been regarded as a most valuable work, both as a manual for daily use in practice, and as a text-book for the student. But it contains much that is of no practical use to the practitioner in this country, and is deficient in several important particulars, inasmuch as the law of real property with us has undergone many changes by the varying course of legislation in the several states. The work before us supplies this deficiency in a highly satisfactory manner. It is beyond all question the best work of the kind that we now have, and although we doubt whether this or any other work will be likely to *supplant* Cruise's Digest, we do not hesitate to say, that of the two, this is the most valuable to the American lawyer. We congratulate the author upon the successful accomplishment of the arduous task he undertook in reducing the vast body of the American law of real property to "portable size," and we do not doubt that his labors will be duly appreciated by the profession.

THE JURYMAN'S GUIDE: DESIGNED FOR THE CITIZENS OF MAINE. BY A MEMBER OF THE BAR. Portland: Hyde, Lord & Duren. 1846. pp. 45.

THIS work has been compiled, as we learn from the preface, "for the benefit of such persons, who [as] have neither time nor inclination to peruse the laws of the state, and the decisions of courts touching the duty of jurors, comprising in the smallest possible space, and at a trifling expense, the required information. It is an unpretending work, upon an important subject, and is submitted to the public with great diffidence." As we never expect to serve upon a jury, we have not read this work with much interest or care, but it seems to be carefully drawn up, and well executed. We confess to some doubt as to the utility of such works, having the same horror of a very wise and intelligent juror, that Sir Walter Scott had of a very religious woman. Jurors ordinarily obtain sufficient information from the court as to their duties, and learn law enough during one term, to serve a whole neighborhood a score of years. We hope the author may hereafter treat of some subject more useful and interesting to our profession, with as much skill as he has shown in the present work.

Intelligence and Miscellany.

Recent American Digests. — We regard it as a fortunate circumstance that the profession have recently been furnished with numerous digests of the decisions of superior tribunals; and especially that each state is likely soon to have a digest of its own reports. Our readers are also aware, that a digest of all the American cases has long been in preparation, the last volume of which is now before the public. Among the digests which have recently been published, and which are very creditable to the editors, may be mentioned Minot's, of Massachusetts, Washburn's, of Vermont, and Gilman's, of Indiana and Illinois. We have seen some of the sheets of a digest of the New Hampshire Reports, by Judge Gilchrist, and we understand that a gentleman of the Maine bar has in preparation a digest of the decisions in that state.

We have had occasion to use Mr. Minot's work more than any of the others, and we think it has many capital requisites of a book which is a necessary and useful incumbrance on the table of every practitioner in our own state. For *convenience of reference*, it is superior to any work of the kind with which we are acquainted. There is a full table of cases, containing the names of plaintiffs and defendants under each letter, with references to the volume where the case is reported, and also the page of the work itself, where the case may be found. The index is also full, complete and convenient. The faults of the digest are such as are to be expected from the manner in which it was made. "It was originally intended," says Mr. Minot, in his preface, "that this digest should be wholly compiled by myself. Subsequently, on account of the urgent demand of the profession for such a work, it became advisable that it should be published very much sooner than would have been practicable under that arrangement and a new one was entered into, by which the greater part of it was to be written by others, the whole, however, remaining under my direction and supervision. Accordingly, my office has been, except as to the articles written by myself, only to arrange the general plan of the Digest, so that every part of the work should be performed, and yet repetition be avoided, and to so modify the work of those gentlemen who actually prepared the respective titles, as to give to the whole as great a degree of unity and correctness as was practicable. In other respects, the titles generally stand as prepared by them."

It is obvious that a work made in this manner cannot be so complete and satisfactory as one made by a single individual; but it is to be considered that one made in the manner last named must, ordinarily, be a long time in preparation, and few men, competent to the work, could be found willing to undertake a task in which the remuneration must bear no comparison with the labor.

The United States Digest is a work of higher pretensions than any before published, and the last volume has been several months before the public. The first volume, by Messrs. Metcalf and Perkins, appeared in 1840. We spoke of it as undoubtedly the best work of the kind ever published in the country. Subsequent examination and use of the work in practice has confirmed the opinion we then pronounced. The remaining volumes, by Mr. Curtis, have some marked defects, which are calculated to do that gentleman injustice. There is nothing in these volumes to show the manner in which they were made. The reader is not informed whether Mr. Curtis did the whole work himself, or had the assistance of others, for whose faithfulness he can only be held responsible, *sub modo*. The presumption, in the absence of

any positive statement, would be that the former supposition is the correct one. But we have reason to know that the fact is different; that the digest was made in the same manner as that of Mr. Minot, "only more so;" by which we mean, that more persons were employed on this work than on Mr. Minot's, and, consequently the defects, likely to arise from the fact that many minds were engaged upon an undertaking in which concentration and unity are capital requisites, are *pro tanto* increased in the work itself. But what we consider a most serious defect, and one which it is not too late to remedy, is the entire omission of any table of cases. Such a defect in any ordinary treatise is a blemish, but in a digest we regard it as "tolerable, and not to be endured." We know there are illustrious examples of this, but every lawyer knows they are *pessima exempla*, and not to be drawn into a precedent.

We have reason to know that considerable disapprobation has been expressed in relation to this work, and our attention has been frequently and urgently called to it by members of the bar. An opinion has been expressed, that it is unfortunate for the profession that the work has been published at all, inasmuch as it will stand in the way of something better. To this we cannot assent. From the great outlay requisite for such an undertaking, and the length of time it must require for any one, two, or three minds to prepare it, there is no probability that we can expect a work by a single individual of sufficient eminence, to receive the confidence of the profession.

Charlestown State Prison. — A society has recently been formed in this establishment called the Mutual Aid Society, the principal members of which are those prisoners who desire to associate together for the purposes of the society. What these specific purposes are, except so far as they are indicated by the name, we have no means of knowing, as we have not seen the "constitution" or "by-laws." We learn, informally however, that about two hundred prisoners have joined the society, and that the first public meeting took place in the chapel of the prison, on the fourth day of July last, under circumstances not a little remarkable. No restraint was imposed upon the prisoners, except to keep good order, and observe the rules of the society. After prayer by the chaplain, an oration was delivered by the warden, when various members were called upon to address the meeting. There was plenty of patriotism, and considerable native eloquence. B. F. Emery, who whilom practised law one flight of stairs above where we now write, was very forcible in his remarks, which were conceived in better taste, we suspect, than some of his ancient jury harangues; and he exhibited that ready wit and marked talent which he is reputed to possess. An ode was recited, and then sung by one of the prisoners. Another was quite eloquent on the Mexican war; and all of them spoke in favor of good order and self-improvement. The exercises continued about four hours, and have been represented to us as in the highest degree interesting, and even instructive.

Motch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

We have received a prospectus of the university of Memphis, Tenn., exhibiting views of its plan, course of instruction, and general regulations, with the trustees, supervisors, and faculties. This university was incorporated last January. It has three departments of instruction, the third of which embraces "those appropriate and high attainments, which are demanded by correct and enlarged views of the four learned professions, viz., of education, of law, of theology, and medicine." The professors in the law department are, Hon. F. P. Stanton, professor of constitutional law and national law, including the conflict of laws, or international law. Henry G. Smith, professor of commercial law, and principles and practice of equity. Hon. V. D. Barry, professor of common law, including pleading, evidence, and contracts.

In the July number of the Western Law Journal it is announced that the publisher has secured the services of the Hon. Charles D. Coffin, judge of the superior court of Cincinnati, in conjunction with those of the present editor, to commence with the next number.

The statement made in a letter from Paris, alluded to in our last, that the Hon. William

Kent had been appointed Dane Professor of Law in Harvard University, was not entirely correct. We understand that Mr. Kent will probably be offered the Royall Professorship.

In our first article this month the reader will have no difficulty in recognizing the pen of the gentleman who has furnished us several interesting papers on continental jurisprudence.

We understand that Chief Justice Wells, of the common pleas, is about to take up his residence near Boston.

It is said that a biography of the late Judge Story is in preparation by his son, William W. Story, Esq.

The state of Michigan is the first to try the experiment of abolishing capital punishment.

Obituary Notice.

Died, in Bangor, Maine, May 27, Hon. William D. Williamson, aged 66. He was born at Canterbury, Conn. July 31st, 1779, and was graduated at Brown University in 1804. Having completed his professional studies in the office of the Hon. Samuel F. Dickinson, of Amherst, Mass., he went to Bangor, in the summer of 1807, where he continued to reside till his decease. While at the threshold of his professional career, and one of the youngest members of the bar, the executive of Massachusetts conferred on him the appointment of county attorney for the county of Hancock. This office he held through different political state administrations, until his election to the senate of that commonwealth, in the spring of 1816. He was annually elected one of the senators of Lincoln, Hancock and Washington district, till the time of the separation of Maine, in 1820. On the organization of the new state he was returned senator from his own county, by a large majority of the votes. General Chandler having been elected senator of the United States, Mr. Williamson succeeded him as president of the senate, and afterwards became the constitutional and acting governor, on the appointment of Governor King, as one of the commissioners under the Spanish treaty. He continued to hold the office of governor till near the close of the first political year, in December, 1821, when he took his seat in congress, to which he had been elected. On the districting of the state anew for the next congress, uniting Somerset with Penobscot, he was succeeded by William Kidder, of Somerset. He was appointed judge of probate for Penobscot county, in 1824, which office he held until the change in the constitution, in 1840.

Mr. Williamson was engaged a long time upon a history of Maine, which was published about ten years ago. It is an elaborate work, carefully prepared, and very valuable to the historical inquirer, although deficient in point of style, and somewhat cumbersome as to arrangement.

At a meeting of the Penobscot bar, held in consequence of Mr. Williamson's death, suitable resolutions were adopted, and a vote was passed to attend his funeral.

Insolvents in Massachusetts for June.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Adams, Zaccheus H.	Boston,	Driver,	June 12,	Bradford Sumner.
Alden, J. Deane,	Boston,	Merchant,	" 16,	George S. Hillard.
Baily, John A.	Brookline,	Housewright,	" 30,	Bradford Sumner.
Barnard William,	Becket,	Farmer,	" 24,	R. F. Barnard.
Barry, Jacob D.	Boston,	Machinist,	" 29,	Bradford Sumner

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Blake, Tyler R.	Fall River,	Trader,	June 11,	Oliver Prescott.
Bradford, Melvin O.	New Bedford,	Trader,	" 4,	Oliver Prescott.
Braley, Ebenezer M.	Fall River,	Laborer,	" 18,	C. J. Holmes.
Brickett, Daniel H.	Haverhill,	Shoe Manufacturer,	" 17,	John G. King.
Brown, Jane C.	Lowell,	Milliner,	" 30,	George W. Warren.
Buckland, Walter, 2d,	Springfield,	Carpenter,	" 3,	E. D. Beach.
Burrows, Nathan K.	Fall River,	Trader,	" 19,	C. J. Holmes.
Chamberlin, Samuel C.	Fall River,	Laborer,	" 15,	Oliver Prescott.
Chandler, George S.	East Bridgewater,	Pedler,	" 8,	Welcome Young.
Chase, Frederic C.	Nantucket,	Trader,	" 5,	Charles Bunker.
Churchill, F. W.	Boston,	Housewright,	" 13,	Bradford Sumner.
Clifford, Harrison,	Lynn,	Trader,	" 4,	John G. King.
Coolidge, C. Austin,	Roxbury,	Auctioneer,	" 27,	Bradford Sumner.
Dallinger, John Jr.	Cambridge,	Trader,	" 12,	George W. Warren.
Davis, Joseph,	Gloucester,	Trader,	" 30,	John G King.
Derlin, Arthur,	Somerville,	Teamster,	" 27,	George W. Warren.
Dewey, Salmon,	Amherst,	Farmer,	" 16,	Edward Dickinson.
Dewing, Seth,	Needham,	Surveyor,	" 26,	S. Leland.
Edmands, George W.	Boston,	Hatter,	" 30,	Ellis Gray Loring.
Edwards, Henry,	Boston,	Merchant,	" 19,	William Minot.
Emerson, William,	Roxbury,	Provision Dealer,	" 25,	S. Leland.
Estes, James H.	Fitchburg,	Sash & Blind Manuf.	" 16,	Isaac Davis.
Faxon, Isaiah,	Boston,	Merchant,	" 16,	George S. Hillard.
Gardner, Benjamin F.	Nantucket,	Trader,	" 25,	Charles Bunker.
Gillett, Simon,	Quincy,	Stable Keeper,	" 2,	S. Leland.
Glass, Ezekiel,	Charlestown,	Laborer,	" 16,	George W. Warren.
Gould, Josiah,	Topsfield,	Yeoman,	" 13,	John G. King.
Hale, Frederick E.	Chelsea,	Currier,	" 12,	Ellis Gray Loring.
Hall, Ezra T.	Roxbury,	Blacksmith,	" 9,	David A. Simmons.
Haskell, Leonidas,	Gloucester,	Trader,	" 3,	John G. King.
Haskins, Charles A.	Boston,	Clerk,	" 24,	George S. Hillard.
Heath, Joseph,	Barre,	Farmer,	" 1,	Walter A. Bryant.
Jenkins, Solon, 2d,	Boston,	Trader,	" 23,	Ellis Gray Loring.
Johnson, Moses,	Boston,	Trader,	" 4,	Ellis Gray Loring.
Jones, Charles H.	Boston,	Innholder,	" 27,	Bradford Sumner.
Kittredge, Francis M.	Chelmsford,	Physician,	" 8,	J. G. Abbott.
Knight, Holland L.	Boston,	Manufacturer,	" 2,	Ellis Gray Loring.
Luther, Henry G.	Boston,	Dentist,	" 27,	George S. Hillard.
Manchester, Job S.	Fall River,	Trader,	" 5,	C. J. Holmes.
Maxwell, William D.	Cambridge,	Carpenter,	" 24,	George W. Warren.
Morrison, Charles K.	Boston,	Carpenter,	" 22,	Bradford Sumner.
Moulton, George W.	Framingham,	Trader,	" 19,	S. P. P. Fay.
Murray, John,	Dorchester,	Trader,	" 4.	George W. Warren.
Perry, Charles H.	Cambridge,	Shoe Dealer,	" 5,	Ellis Gray Loring.
Pevear, Charles B.	Roxbury,	Boot & Shoe Manuf.	" 12,	S. Leland.
Phillips, Alvin W.	Charlestown,	Cabinet Maker,	" 1,	George W. Warren.
Pierce, Elias D.	Charlestown,	Merchant,	" 29,	George S. Hillard.
Pitts, Seth S.	Uxbridge,	Trader,	" 18,	Chas. W. Hartshorn.
Pomroy, Henry F.	Windsor,	Yeoman,	" 16,	Franklin O. Sayles.
Poole, Ebenezer,	Boston,	Stone Cutter,	" 20,	Ellis Gray Loring.
Potter, Nathan D.	Boston,	Trader,	" 4,	Ellis Gray Loring.
Pratt, Ephraim L.	Boston,	Merchant,	" 4,	Ellis Gray Loring.
Reed, Charles E.	Roxbury,	Baker,	" 29,	D. A. Simmons.
Remick, Adoniram,	Boston,	Merchant,	" 30,	George S. Hillard.
Rich, Isaac B.	Plymouth,	Trader,	" 17,	William Thomas.
Richardson, Charles,	Framingham,	Trader,	" 17,	S. P. P. Fay.
Ripner, George, M.	New Bedford,	Cooper,	" 19,	Oliver Prescott.
Ruggles, Simon,	Boston,	Provision Dealer,	" 17,	Bradford Sumner.
Sawyer, Sanford,	Fitchburg,	Wheelwright,	" 11,	Charles Mason.
Skiff, Stephen,	Tisbury,	Gentleman,	" 30,	Theod. G. Mayhew.
Spitz, Peter and Hayman P.	Boston,		" 17,	George S. Hillard.
Terry, Henry G.	Roxbury,	Bookbinder,	" 15,	George S. Hillard.
Thompson, Augustus J.	Boston,	Merchant,	" 30,	George S. Hillard.
Todd, Frederick A.	Roxbury,	Merchant,	" 16,	George S. Hillard.
Tower, Charles,	Sturbridge,	Yeoman,	" 30,	Chas. W. Hartshorn.
Tribble, Isaac,	Plymouth,	Trader,	" 17,	William Thomas.
Tucker, Edwin P	Belchertown,	Merchant,	" 16,	Ithamar Conkey.
Turner, Charles N.	Boston,	Mason,	" 8,	Bradford Sumner.
Turner, Henry J.	Boston,	Mason,	" 12,	Bradford Sumner.
Walker, John,	Boston,	Tin Plate Worker,	" 30,	Bradford Sumner.
Walker, William B.	Boston,	Merchant Tailor,	" 30,	Bradford Sumner.
Wall, Samuel J.	Boston,	Trader,	" 9,	Ellis Gray Loring.
Warner, John E.	Boston,	Tin Plate Worker,	" 30,	Bradford Sumner.
Welch, James M.	Boston,	Housewright,	" 4,	George S. Hillard.
Witherell, Charles A.	Boston,	Mason,	" 8,	Bradford Sumner.
Woodman, Levi T.	Boston,	Housewright,	" 12,	Bradford Sumner.
Worcester, Lathrop L.	Fitchburg,	Sash & Blind Manuf.	" 16,	Isaac Davis.
Young, William H.	Leominster,	Trader,	" 16,	B. F. Thomas.